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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

JIMMY L. DUNCAN,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a plaintiff under the Americans With Disabilities Act, to show a substantial limitation in the major life activity of working and thus a disability, must demonstrate (a) that he is precluded by that disability from a substantial class or range of jobs, or (b) that there are few (but some) jobs which he is able to do despite that disability.

II. Whether a plaintiff under the Americans With Disabilities Act, in order to show a substantial limitation in the major life activity of working, must present quantitative statistical evidence of the numbers and types of jobs available.

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Petitioner Jimmy Duncan respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit in *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (en banc) (D.C. Cir. 2001) and 201 F.3d 482 (D.C. Cir. 2000) are reprinted in the Appendix hereto App. at 1a and 27a.

The Memorandum and Order of the United States District Court for the District of Columbia Circuit denying the Motion for Judgment and/or For New Trial is unreported and reprinted in the Appendix hereto at App. 54a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the District of Columbia Circuit En Banc reversing the decision of the United States District Court for the District of Columbia was entered on March 2, 2001 at App. 27a. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. §2101 (c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(2)(A) of the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336,104 Stat. 327,329-30,

42 U.S.C. §12102(2) (A), provides, in pertinent part: "The term 'disability' means, with respect to an individual...a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Section1630.2(i) of Title 29, Code of Federal Regulations, provides: "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Section1630.2(j)(2) of Title 29, Code of Federal Regulations, provides:

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Section 1630.2(j)(3) of Title 29, Code of Federal Regulations, provides, in pertinent part:

> With respect to the major life activity of working
>
> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life

activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of 'working':

(A) The geographical area to which the individual has reasonable access;
(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment(class of jobs); and/or
(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment(broad range of jobs in various classes).

Section 1630 App. at 349, of Title 29, Code of Federal Regulations, provides in pertinent part:

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is

> substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes...For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g. the class of semi-skilled jobs ...
>
> The terms 'number and types of jobs' [A]s used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment.

INTRODUCTION

This case presents two major and interelated questions regarding the Americans With Disabilities Act: (1) What constitutes a substantial limitation in the major life activity of working?; (2) What type of evidence must be adduced to support such a claim? The United States Court of Appeals for the District of Columbia Circuit, in a fractured en banc decision, held that an ADA plaintiff, to show a substantial limitation in working, must present statistical quantitative

evidence on the numbers and types of jobs available to the plaintiff (instead of evidence regarding the classes of jobs from which a plaintiff is precluded). This holding is contrary to this Court's holdings, creates an expanded standard of proof that is in conflict with that of at least six federal circuit courts of appeal and is inconsistent to the statute, its regulations and interpretive guidelines.

This Court recently granted certiorari in a case presenting similar issues, *Toyota Motor Mfg., Ky., Inc. v. Williams*, Petn. No. 00-1089 (cert. granted, April 16, 2001). *Williams* involves the issue of whether an impairment which causes a plaintiff to be unable to perform the major life activity of manual tasks and/or working constitutes a disability under the ADA. The petitioner in the *Toyota* case correctly observed that the Sixth circuit decision in that case was in conflict with the decision herein.[1] This Court should grant certiorari in the instant matter because the present case involves even broader questions on a similar subject as *Williams*. This Court should also grant certiorari to resolve the multiple conflicts on the important and recurring questions presented concerning the requirements of proof to show a substantial limitation in working.

Alternatively, this Court should hold the Petition for Certiorari in this case pending the decision in *Williams*, since it presents similar issues and *Williams* may well decide the outcome of this case.

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[1] In fact, the Petitioners in *Williams* recognized the conflict between *Williams* and the instant case by noting in its Reply Brief that "the conflict over the question presented has only intensified since we filed our Petition," citing *Duncan v. WMATA*, 240 F.3d 1110 (D.C. Cir. 2001) (*Williams, supra*, Reply Brief at 6).

STATEMENT OF THE CASE

Jimmy Duncan filed the instant action under the ADA contending that the Washington Metropolitan Area Transit Authority, ("WMATA") unlawfully terminated him because of his disability (i.e. a lower back impairment). In addition, Duncan alleged that WMATA failed to reasonably accommodate his disability by failing to transfer him to a vacant position for which he was qualified. The matter was tried in front of a jury in the United States District Court for the District of Columbia which awarded Mr. Duncan $250,000 in compensatory damages. The District Court denied WMATA's post trial Motion for Judgment And/Or For New Trial. App. 54a.

On appeal, a sharply divided panel of the United States Court of Appeals for the District of Columbia Circuit overturned the jury verdict. The majority opinion vacated the judgment on the jury verdict and all post trial orders, holding that a plaintiff must present in all cases under the ADA, as a necessary element of proof, evidence of the numbers and types of jobs that were available to workers with similar work experience and physical impairments in the geographical area to show a substantial limitation in working to create a disability under the ADA. App. 10a-11a. The majority requirement is that a plaintiff must show evidence of how many jobs are available or left for him to show a substantial limitation in working. This is contrary to almost all courts and the EEOC regulations which instead turn on whether a plaintiff is precluded from a class of jobs or substantially limited from a broad range of jobs.

Chief Judge Harry Edwards in his dissenting opinion explained that there is a split in the circuits on this issue.

"[T]he relevant law from our sister circuits,

> however, compels the conclusion that the majority has answered this question incorrectly ... I can find no decision in which an appellate court has held that an ADA plaintiff must present evidence similar to that required by the majority in the instant case."

App. 15a-16a.

Judge Edwards recognized that the majority's focus on the jobs available to a plaintiff created an almost impossible burden:

> "In adopting this rule, the majority essentially holds that, *in order to prevail under the statute, ADA plaintiffs must prove, with quantitative certainty, that almost all jobs are outside their reach. The statute does not require this, nor do the opinions from the Supreme Court. This rigid formulation, simply rewrites the statute - something we have no authority to do - and virtually ensures that very few plaintiffs will ever prevail under the ADA in this circuit.*"

App. 26a, (emphasis added).

The United States Court of Appeals for the District of Columbia Circuit thereafter granted a Petition for Rehearing En Banc. The decision of the en banc court, issued on March 2, 2001 included four separate opinions. The en banc court's majority opinion was consistent with the majority panel opinion, and again vacated the jury verdict and all post trial orders. The en banc court specifically held:

> That Duncan failed to meet his evidentiary burden [because]... the ADA requires a Plaintiff in Duncan's position to produce some evidence of the numbers and

> types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs *that is, the total number of such jobs that remain available to the Plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range.*

App. 33a-34a. (emphasis added).

Again the focus of the majority was on the jobs available to Duncan not the jobs he was precluded from to show a substantial limitation in working. Chief Judge Edwards again dissented on the same grounds as his dissent from the earlier panel decision. App. 44a.

STATEMENT OF FACTS

Most of the facts in this matter were not in controversy and are set forth in the appellate opinions below. Jimmy Duncan is a 51 year old unskilled laborer with less than a high school education. Mr. Duncan performed unskilled, manual/heavy labor jobs for virtually all of his working life. App. 52a.

Mr. Duncan proved at trial that he suffered from degenerative disc disease in his lower back. In December 1992, his treating physician permanently restricted him from performing any job that required heavy lifting, and placed him on a restricted light duty status in which he was limited to lifting twenty pounds or less. App. 3a. That restriction precluded Mr. Duncan from performing his then heavy lifting job and from doing work in three broad classes of jobs recognized by the Department of Labor regulations: all jobs

requiring medium, heavy and very heavy lifting.[2]

Thereafter Mr. Duncan repeatedly requested reasonable accommodation from his supervisors by way of a transfer to a light duty vacant position. Id. No light duty positions were ever offered and a decision maker labeled Duncan a "damaged bill of goods," and thereafter, terminated him. The jury found that petitioner was fired because of his disability, a conclusion the Court of Appeals did not question. After termination, Mr. Duncan received unemployment benefits for nine months before finding a light duty part time job only earning one-third of his pre-termination salary. App. 52a. The central question in controversy in the Court of Appeals was whether petitioner is "disabled" within the meaning of the ADA.

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW IS CONTRARY TO MANY OTHER FEDERAL CIRCUIT COURTS OF APPEAL AND THE EEOC REGULATIONS AND GUIDELINES REGARDING THE PROOF REQUIREMENTS TO SHOW A SUBSTANTIAL LIMITATION IN WORKING UNDER THE ADA.

The majority en banc opinion of the Court below creates both a new definition of "substantial limitation in the major life activity of working" and establishes a stringent standard of proof that is contrary to case law from at least six Federal Circuit Courts of Appeal and is inconsistent with *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). App. 22a-24a. Further, this holding imposes a proof requirement that is

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[2] See 20 C.F.R. §404-1567 which refers to these categories as classifications of jobs.

not contemplated by the ADA and EEOC regulations or interpretive guidelines because it sets an absolute standard when courts should be performing an "individualized inquiry." [3] App. 26a.

The en banc court candidly recognized that its decision was directly contrary to decisions of the Sixth, Ninth and Eleventh Circuits. App. 35a, Citing *Burns v. Coca-Cola Enter, Inc.*, 222 F.3d 247 (6th Cir. 2000), *Wellington v. Lyon County School Dist.*, 187 F.3d 1150 (9th Cir. 1999); and *Mullins v. Crowell*, 228 F.3d 1305 (11th Cir. 2000). The en banc court did not reference three other circuits that are also in conflict with its holding: *Quint v. A.E. Staley Mfg. Co.*, 173 F.3d 1 (1st Cir. 1999); *Bartlett v. N.Y. State Bd. Of Law Examiners*, 236 F.3d 69 (2d. Cir. 2000); and *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, (4th Cir. 1998). See infra at 15-19. Further, the Seventh Circuit has issued several conflicting opinions that decide the issues herein inconsistently and show how clouded these issues are even inside the circuits. See infra at 19-21.

A starting point for analysis of evidence to establish an ADA claim is appropriately the ADA, its regulations and interpretive guidelines and examples. The ADA prohibits discrimination of an employee based upon a disability. 42 U.S.C. §12112(a) (1994). The ADA defines a "disability" as, inter alia, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual ... " 42 U.S.C. §2102(2)(a). The statute does not further define these terms, but the regulations do.

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[3] This Court stressed in *Sutton* at 483 citing *Bragdon v. Abbott*, 524 U.S. 624, 657 (1998) that a finding of whether one is disabled is an "individualized inquiry" depending on the facts and circumstances of each case.

With respect to the major life activity of working, the term "substantially limits" means:

> Significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. §1630.2(j)(3)(i)

The regulations identify three factors that should be considered in determining whether such a "substantial limitation" is present:

> (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact of or resulting from the impairment. 29 C.F.R. §1630.2(j)(2).

In addition to the above factors, the regulations state that the following three factors may[4] be considered to determine if an individual is substantially limited in the major life activity of working:

> (A) the geographical area to which the individual has access;
>
> (B) the job from which the individual has been disqualified because of an impairment,

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[4] Although the regulation states that these three other factors may be considered by courts, this Court in *Sutton* cited these factors and said they "should." be considered. Id at 491. Nevertheless, this Court did not state that these factors must be considered which is what the lower court erroneously held.

> and the number and types of jobs utilizing similar training, knowledge, skills or abilities, with that geographical area, from which the individual is also disqualified because of the impairment; and/or;
>
> (C) the job from which the individual has been disqualified because of an impairment and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities within that geographical area, from which the individual is also disqualified because of the impairment...29 C.F.R. § 1630.2(j)(3)(ii)

Clearly, the latter regulation focuses on the jobs one is disqualified or precluded from, not the jobs available to a plaintiff with an impairment.

Even when consideration of these factors is necessary to make such a determination, the interpretive guidelines explain that

> the term 'number and types of jobs...[is] not intended to require an onerous evidentiary showing. Rather the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g. 'Few,' 'many,' 'most') from which an individual would be excluded because of an impairment. (emphasis added).

In this case, plaintiff has limited education, training, and work skills, and a history of performing unskilled labor jobs involving "heavy" lifting. For such a person, the inability to lift more than twenty pounds significantly restricts his ability to perform a "class of jobs" -- that is all jobs requiring lifting

above this weight, which all unskilled heavy labor jobs require by definition. Thus a requirement that Mr. Duncan submit evidence on the number and types of jobs he was able to perform in this case was superfluous evidence given his lack of education, training and transferable work skills because of his preclusion from three separate classes of jobs.

A. A Split in The Circuits Exists on The Issue of Whether Evidence Regarding the Number and Types of Jobs In The Relevant Geographic Area Available To The Plaintiff Is Required To Show A Substantial Limitation In Working

The District of Columbia Circuit's decision in this case generates a split among the circuits on two important issues that federal courts regularly face. First, what does a plaintiff have to prove to show a substantial limitation in working? (a) the number of jobs available to him because of an impairment or; (b) the class of jobs or broad range of jobs one is precluded from because of an impairment. Second, what type of evidence is required to prove substantial limitation in the major life activity of working under the ADA? (a) Is vocational statistical evidence required in all cases or one of many factors that may be considered; (b) Are a plaintiff's education, employment history and jobs held post-termination factors to be considered?

The rules that the District of Columbia Circuit has formulated – 1) that a plaintiff must present evidence of the number of jobs available because of the impairment instead of evidence of the classes of jobs one is precluded from; and 2) that quantitative statistical evidence of the jobs available is required to present a prima facie case in every case – is unprecedented and not supported by most courts of appeal.

Almost all circuits have focused on the fact that a

plaintiff's impairment precludes him or her from a class of jobs, and not the opposite (i.e. availability of jobs must be few) as the District of Columbia Circuit held. Further, many other circuits have allowed cases to go to a jury based upon precisely the set of evidence held legally insufficient by the court of appeals below; specifically, several cases were allowed to go forward without any vocational or other evidence of the job market which was either available to, or from which a plaintiff was precluded, because of an impairment. This Court should grant certiorari to resolve this conflict between the decision below and other recent decisions from various courts of appeal. See S. Ct. Rule 10(a).

The en banc decision expressly acknowledged that it was in conflict with decisions from the Sixth, Ninth and Eleventh Circuits. App. 35a. It also conflicts with decisions from the First, Second and Fourth circuits.

To begin with, the decision from the en banc court below directly conflicts with decisions from both the First and Ninth Circuits. These courts analyzed extremely similar fact patterns to the case herein and found a triable issue of fact was established when a plaintiff's impairment created a "significant barrier to employment by considering the plaintiff's training, skills and abilities." *Wellington v. Lyon County School Distr.*, 187 F. 3d 1150,1155 (9th Cir. 1999) and *Quint v. A.E. Staley Mfg. Co.*, 173 F.3d 1, 12 (1st Cir. 1999) . As noted below, the consideration of the plaintiff's training, skills and abilities to create a triable issue of fact is consistent with this Court's analysis in *Murphy*.

Wellington holds that a plaintiff can establish the existence of a substantial limitation on the major life activity of working by demonstrating that he is medically precluded from performing the heavy labor work he did his entire life because

of a physical impairment. The Ninth Circuit states:

> These facts suggest that Wellington may be precluded from working in any capacity involving construction, maintenance or light plumbing. Considering Wellington's training, skills and abilities, there exists a question of fact as to whether he is significantly restricted in the ability to perform work in a class of job
> ...

Id at 1155.

No evidence was presented in *Wellington* as to the number and types of jobs that remained available in the geographical area. Further, no vocational statistical evidence was required either. Yet the Ninth Circuit found a factual issue and affirmed the denial of a Motion for Summary Judgment. The District of Columbia Circuit below acknowledged *Wellington* was contrary to its holding herein. App. 35a.

In *Quint*, the First Circuit affirmed the denial of the Defendant's Rule 50 Motion and stated:

> Quint adduced competent evidence that her training, knowledge, skills, a high school education and a work history of heavy physical labor likely would restrict her to such jobs, which were the most prevalent in her geographical area.

Id at 12.

The only evidence presented at trial regarding the number and types of jobs from which Quint was precluded in the geographic area was Quint's treating physician's testimony that she was "precluded from a lot of jobs" and the plaintiff's similar testimony. Again the focus was on preclusion from a

class of jobs and not what jobs remained available. Further, no vocational or statistical evidence of the job market either available to Quint or from which Quint was precluded was presented. The evidence in *Wellington* and *Quint* is consistent with the instant case wherein Duncan's treating physician testified Duncan was restricted from lifting over twenty pounds which precluded him from all jobs within three broad classifications of jobs. There was absolutely no necessity to present superfluous quantitative evidence from the labor market through a vocational rehabilitation expert to show what jobs were available to an unskilled worker in this geographical area and how many of these jobs he would be able or unable to perform with his medical limitations. This is so because Duncan could not perform any jobs in three broad classes and his education and prior work history precluded him from performing skilled sedentary work.

The First Circuit in *Quint* also followed the EEOC guideline that only requires a Plaintiff to present evidence of

> general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g. 'few', 'many', 'most') from which an individual would be excluded because of an impairment.

Id citing 29 C.F.R. Pt. 1630, App at 349.

The Seventh Circuit has also followed this guideline. See *Skorup v. Modern Door Corp.*, 153 F.3d 512,515 (7th Cir. 1998). The Court below required specific statistical evidence of the number and types of jobs available to Duncan, which was totally in conflict with the EEOC guideline above.[5]

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[5] The court below's holding is explicitly at odds with the guidelines in several other areas. First, the guidelines explicitly state that the relevant inquiry is the "approximate number of jobs . . . from which an individual

Four other Circuits, the Second, Fourth, Sixth and Eleventh also support Duncan's position herein and are in conflict with the en banc court from the District of Columbia Circuit. In *Bartlett v. N.Y. State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000), the Second Circuit held that an impairment which precluded Plaintiff from passing the bar exam constituted a substantial limitation in working because Plaintiff was excluded from "countless jobs" involving the practice of law. Id at 84. No statistical evidence was presented as to the numbers and types of jobs from which the Plaintiff was precluded; the court simply noted that law jobs that did not involve the actual practice of law were "the exception and not the rule." Id. Further, no evidence was presented as to what work Bartlett could do.

The Fourth Circuit in *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 303 (4th Cir. 1998), held that a plaintiff who was medically precluded from doing work in his "chosen field" of maintenance supervisory work created a factual issue on whether plaintiff was significantly restricted in working. Again, no vocational statistical evidence was required and the

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would be excluded because of an impairment," not the jobs available to a plaintiff as the District of Columbia Circuit held. 29 C.F.R. §1630 2(j)(3).

Second, the panel majority below explicitly rejected the example from the EEOC interpretive guidelines which states that an individual "with a back injury that prevents him from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs"... The panel stated this example: "is at odds with *Sutton*." App. 10a. As noted below, this example is not at odds with *Sutton* at all or *Murphy* but consistent with the holdings in those cases.

court looked at the class of jobs the plaintiff was precluded from not the jobs available to plaintiff.

In *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247 (6th Cir. 2000) the Sixth Circuit upheld a finding that a Plaintiff was disabled from working when his impairment precluded him from performing at least 50% of the jobs that he was qualified to perform given his educational background and experience. Id at 256. This finding was based solely upon Burns' limited educational background and work experience along with his physician's testimony that he was restricted from lifting greater than 23 pounds. Again the focus in both of these cases was on preclusion from classes of jobs or broad ranges of jobs and not the availability of jobs. Further, no vocational or other evidence regarding the numbers and types of jobs the Plaintiff was precluded from was submitted at all; yet, the Sixth Circuit upheld a finding denying a Motion for Summary Judgment on this issue.

Additionally, the Eleventh Circuit in *Mullins v. Crowell*, 228 F.3d 1305,1314, n.18 (11th Cir. 2000) concluded that

> [E]xpert vocational evidence, although instructive, is not necessary to establish that a person is substantially limited in the major life activity of working ... [6]

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[6] The rationale for this conclusion was the Eleventh Circuit noted it had been "[I]nstructed that it 'may' and 'should' (not 'shall' or 'must') consider the existence of jobs in the relevant geographical area ...." This rationale is consistent with the EEOC guideline which the panel and en banc majority rejected by requiring such statistical evidence. 29 C.F.R. §1630.2(j)(3)(ii).

The Seventh Circuit has issued several decisions that are on both sides of the issues herein and shows a large amount of disarray in the Seventh Circuit itself. First, most recently in *EEOC v. Rockwell Intern. Corp.*, 243 F.3d 1012,1017 (7th Cir. 2001), the Seventh Circuit stated: " [A plaintiff's] case must include some proof of the 'number and types of jobs' within the 'geographical area to which the [claimant] has reasonable access.'" (other citations omitted). This statement seems to support the District of Columbia Circuit's holding below that a Plaintiff must present evidence of the jobs available to a Plaintiff to show preclusion from a class of jobs. Yet, later in *Rockwell*, the Seventh Circuit stated that the EEOC "had to come up with some evidence of the number and types of other jobs in Southern Illinois from which the job applicants would be excluded because of their perceived impairment.."Id at 1017-18. (emphasis added) Here the Seventh Circuit focuses on jobs from which the Plaintiffs were excluded and not jobs available to a Plaintiff.

Although the court in *Rockwell* declined to issue a per se rule that such statistical evidence was in all cases required, it found such evidence lacking and upheld the grant of a Motion for Summary Judgment. The majority noted that there were some cases such as *DePaoli v. Abbott Lab.*, 140 F.3d 668,673 (7th Cir. 1998) in which evidence of the job market was not necessary because "[T]he 'claimants' impairments are so severe that their substantial foreclosure from the job market is obvious." Id. Finally, the *Rockwell* court again cited the guideline that only required generalized evidence showing a preclusion from a "few, many or most jobs in a particular class or in a broad range of [jobs]." Id at 1018.[7]

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[7] As noted above, the court below failed to follow this and numerous other EEOC guidelines and regulations which almost all courts have given great deference to. See *Heymann v. Queens Village Committee*

The dissent in Rockwell asserted that the EEOC met its burden "in a pragmatic way rather than through the use of statistics." Id at 1019. Further, the dissent noted that if job requirements of a particular job from which a plaintiff is excluded are so general such as a high school education and an ability to lift over thirty pounds, perform frequent repetitive motions and regular attendance,

> they are general enough to describe a broad range of jobs or a certain class of unskilled work. A trier of fact can tell the difference between generalized criteria that will cut across a broad range of jobs, and specialized criteria that are employer and workplace-specific, whether or not a vocational expert tells it how many thousands of jobs in the relevant geographic area have similar requirements...

Id at 1020. (Emphasis added).

This was exactly the evidence presented by Duncan herein.

Finally, the dissent in *Rockwell* pointed out that the Seventh Circuit previously in three decisions did not require vocational statistical evidence of the job market: *DePaoli*, *supra*, (cumulative trauma injuries that limited a plaintiff's

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for Jamaica Adolescent Program, Inc., 198 F.3d 68,72 (2d Cir. 1999); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296,307 (3d Cir. 1999); *Clemente v. Executive Airlines, Inc.*, 213 F.3d 25,30, n.2 (1st Cir. 2000); *Burns v. Coca Cola Enterprises, Inc.*,222 F.3d 247 (6th Cir. 2000); *Fjellestad v. Pizza Hut*, 188 F.3d 944, 948-49,954, n.8 (8th Cir. 1999); *Muller v. Costello*, 187 F.3d 298,312,n.5 (2d Cir. 1999). Accordingly, again there is a split in the Circuits on this issue. Since the Court below did not follow the regulations or guidelines and so many Circuits have afforded them great deference, this is an additional reason to grant certiorari.

ability to perform manufacturing jobs raised a triable question of fact whether they were significantly restricted from performing a class or broad range of jobs, and thus within ADA coverage.) *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996)(medical restrictions on plaintiff with shoulder injury "[N]o overhead work, heavy lifting, or pulling and pushing out from his body - might apply to a broad range of jobs, and are more than job specific," and were sufficient for jury to find "[S]houlder impairment does substantially limit his ability to work."); *Best v. Shell Oil Co.*, 107 F.3d 544, 548-49 (7th Cir. 1997) (evidence that plaintiff's impaired knee might preclude him from all truck driving jobs, or that employee "[P]erceived [plaintiff] as having a disability that prevented him from working as a truck driver," was sufficient to raise triable question whether plaintiff was substantially limited in working).

Thus an analysis of the Seventh Circuit case law shows how remarkably split even this one circuit is on these issues of whether and in what circumstances, demographic labor market evidence is required to show a substantial limitation in working and thus a disability.

Finally, four circuits independently recognize that a triable issue of fact is established when a plaintiff's impairment creates a "significant barrier to employment by considering the plaintiff's training, skills and abilities." *Quint*, *supra*, *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778,783 (3rd Cir. 1998); *Webb v. Garelick Mfg.Co.*, 94 F.3d 484, 488 (8th Cir. 1996) and *Wellington*, *supra*. The *Mondzelewski* Court concluded that "because the effect that a particular impairment will have on a person's ability to work varies depending on that person's background and skills, it is not easy to envision how any other approach could be taken." Id.

Therefore, under the First, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuit approach, courts may look to three types of evidence to create a triable issue of fact on the issue of whether one is substantially limited in the major life activity of working and thus disabled: (1) A plaintiff's educational background and training; (2) A plaintiff's work history and skills; and (3) The relevant job market from which a Plaintiff is precluded because of his/her impairment; not the jobs that are available to the plaintiff. The majority analysis below ignored totally the first two types of evidence (contrary to the First, Third, Fourth, Sixth, Eight, Ninth and Eleventh Circuit approach) and held that evidence of the numbers and types of jobs available to a plaintiff is required to prove a substantial limitation in working in all cases. The court below held such evidence to be lacking in plaintiff's case in chief and a substantial jury verdict was reversed.

Evidence regarding the number and types of jobs available in a particular geographical area may be useful in some cases. A Plaintiff with a varied vocational history in skilled professions and strong educational qualifications may not be precluded or significantly restricted from a class jobs or broad range of jobs in the Washington D.C. job market. If such a Plaintiff contended that he was so precluded, he would need to prove the number and types of jobs in the relevant job market that he could not do.[8]

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[8] Vocational statistical evidence is also helpful where medical restrictions do not automatically or obviously preclude one from a class of jobs as was the case herein. See Fiellsted v. Pizza Hut of America, Inc., 188 F.3d 944, 949-950 (8th Cir. 1999). (Medical restrictions that limited a restaurant manager's ability to work only 35-40 hours per week with no more than three consecutive days of work per week along with vocational statistical evidence created a triable issue of fact).

On the other hand, a plaintiff who only has done manual work, has a limited education and has no hope of doing skilled work does not need to present such evidence. Why would he/she need to prove the number and types of skilled work either available or unavailable to him/her in any geographical area if his/her work history and educational background would not qualify him/her for such jobs? Additionally, why would one need to prove the number and types of unskilled manual jobs that were unavailable in this area if one's impairment precluded one from doing all such work? A jury does not gain any knowledge or benefit from receiving statistical evidence as required by the District of Columbia Circuit herein because it did not matter if Duncan was precluded from one, one thousand or one million heavy labor jobs since he had no transferable skills to change professions and gain employment within his medical limitations. Duncan's lower back impairment clearly created a "significant barrier to employment" based upon all of his personal characteristics and facts in the record and he should have been afforded protection under the ADA. Such statistical evidence was superfluous in the present case and yet the lack of such evidence was used as a basis to vacate a jury verdict.

Further, if such statistical evidence is required in all cases it would open a pandora's box of unnecessary litigation squabbles over issues whether: 1) the same standard of proof should be required in rural vs. urban areas; 2) what is the actual geographic area to be utilized; 3) what percent of jobs statistically must a plaintiff show preclusion from within a particular class (i.e. 49%, 51%, 66%, etc.) to show a significant restriction in working? There is no reason to create such unnecessary litigation when this proof is not mandatory.

In conclusion, there is clearly a split among and between the Circuits on the questions presented and this Court

should grant certiorari to settle the questions of law herein.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

II. THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT

Sutton v. United Airlines, 527 U.S. 471 (1999) principally holds that mitigating or corrective measures must be taken into account to determine if one is disabled or not under the ADA. This holding has no application to the present case as there was no record evidence that Mr. Duncan's back impairment was anything but a permanent condition and was not correctable.

Sutton also held that under the facts presented, the plaintiffs failed to state a claim that they were"regarded as" being substantially limited in the major life activity of working and thus disabled. Without determining the amount of deference due the EEOC regulations and guidelines, this Court nonetheless cited to the EEOC regulation defining the term "substantially limiting" when referring to the major life activity of working and stated one must show preclusion from a class of jobs. Id at 491. (emphasis added).

However, the lower court, misinterpreted Sutton in two distinct ways: 1) the focus on availability of jobs instead of preclusion from jobs to show a substantial limitation in working; 2) the evidentiary requirement to present vocational statistical evidence.

On the first issue, the lower court states:

This (citing *Sutton* at 491-92) passage makes

> clear that whether an impairment substantially limits the major life activity of working depends primarily on the availability of jobs for which the impaired person qualifies.

App. 31a-32a. (emphasis added).

Again, the focus in the District of Columbia Circuit was on the "availability of jobs" in the demographic area and not on the jobs one was precluded from to show a substantial limitation in working. *Sutton* does not require a showing that the number of jobs available to a plaintiff are sufficiently low to show a substantial limitation in working; *Sutton* only requires a showing of preclusion from a class of jobs. Applying the D.C. Circuit standard, an ADA Plainitff, according to Chief Judge Edwards, "[M]ust prove with quantitative certainty that almost all jobs are outside their reach." App. 26a. This Court should grant certiorari to clarify its prior holding in *Sutton* which has been misapplied by the court below.

On the second issue, this Court held that the Plaintiffs in *Sutton* failed to state a claim that they were regarded as disabled because they were only precluded from one job (i.e. a global airline pilot) and not a class of jobs or broad range of jobs (i.e. all airline pilots) as is required under the regulation. Id at 492. Mr. Duncan, on the other hand, presented expert medical proof that he could no longer lift greater than twenty pounds thus precluding him from three broad classes of jobs as established by D.O.L., (i.e. jobs that required medium, heavy and very heavy lifting). Certainly, the class of jobs that require heavy lifting is much broader than the class of jobs recognized as an appropriate class of jobs in *Sutton* - - all airline pilots.

Contrary to the majority holding below, *Sutton* does not require a Plaintiff "[T]o produce some evidence of the number

and types of jobs [available to the plaintiff] in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs." App. 24a. As Chief Judge Edwards said in his dissenting opinion below:

> Nothing in the EEOC regulations, however, says that a plaintiff must in every case proffer quantitative evidence detailing the relevant job market. Indeed, the relevant regulations both pre-Sutton and post-Sutton suggest that courts may look to the available job market as one among several relevant factors in evaluating whether or not an individual is disabled. Sutton does nothing to change this.

Id.

The holding below totally misinterprets *Sutton* and runs contrary to the statute. As recognized by this Court in *Sutton*, to show a substantial limitation in working, one must show preclusion from either a class of jobs or significant restriction from a broad range of jobs in various classes. *Sutton* does not hold that a plaintiff must show that there are very few jobs left available to him/her. The relevant inquiry has nothing to do with the jobs available to the plaintiff but is only concerned with preclusion from classes of jobs or broad ranges of jobs. This is so because the statute's purpose is to protect people who are at a disadvantage and can not compete in the open market place because of a physical or mental condition with able bodied workers. Injured people who have a reduction in the available job pool and are precluded from a class of jobs or significantly restricted from a broad range of jobs should be protected by the statute. They should not be required to show that there are very few jobs left available to them because this would be an impossible burden to meet and will eviscerate the meaningfulness of the ADA. The ADA is designed to cover those individuals who have a substantial limitation in work

because of an impairment. Injured people should not have to show an almost complete inability to find work. See *Bragdon*, *supra* at 641. This Court needs to grant certiorari to clarify the proof requirements as expressed in *Sutton* and *Murphy*.

This Court in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) upheld the grant of a Motion for Summary Judgment against an employee who was terminated because of hypertension. Murphy argued that he was "regarded as" disabled since he was precluded from working as a truck driver which required Department of Transportation (D.O.T.) Certification which he could not obtain as a result of his impairment of hypertension.

This Court held that *Murphy* (similar to the plaintiffs in *Sutton*) was not significantly restricted in the major life activity of working since he was only precluded from one mechanic job (i.e. a job which required one to be able to drive a commercial motor vehicle) and not all mechanic jobs generally. Indeed, this Court noted that it was undisputed that *Murphy* "was generally employable as a mechanic," that he has performed mechanic jobs not requiring DOT certification for many years and became employed again as a mechanic shortly after leaving UPS. Id at 524. This Court also stated:

> "moreover, respondent presented uncontroverted evidence that petitioner could perform jobs such as diesel mechanic, automotive mechanic, gas-engine mechanic...all of which utilize petitioner's mechanical skills...
>
> Consequently, in light of petitioner's skills and the array of jobs available to petitioner utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that petitioner is,

at most, regarded as unable to perform only a particular job..." Id.

Thus both *Sutton* and *Murphy* do not require a showing of the number and types of jobs "available" to the plaintiff to show a substantial limitation in working but only require a showing of "preclusion" from a class of jobs or substantial limitation from a broad range of jobs.

Further, *Sutton* and *Murphy* both support Mr. Duncan herein as he showed he was medically precluded from performing three separate classes of jobs, that is the job classifications of medium, heavy and very heavy lifting jobs as recognized by D.O.L. These classes of jobs are broader than those recognized in *Sutton* and *Murphy* by this Court as appropriate classes of jobs - - all airline pilot and mechanic jobs. Therefore, no additional evidence was necessary to be presented in this case.

Further, *Murphy* supports Duncan's position because it shows this Court considers a plaintiff's skills, prior employment history and ability to obtain employment after termination as relevant facts to determine if a plaintiff's impairment significantly limits the plaintiff in the major life activity of working. Duncan had no skills or educational background other than to perform unskilled heavy labor jobs which he could not perform any more because of his lower back impairment. Then he ended up, after nine months on unemployment, with a part time job earning one-third of his pre-termination salary. Yet, the lower appellate court failed to recognize that these facts alone were sufficient to show a substantial limitation in working. This Court must clarify the proof requirements by an ADA plaintiff and make it clear that a court and jury

> must engage in a context-dependent assessment of the plaintiff's personal characteristics, education, work history, and may consider the available job market in order to assess whether the plaintiff is excluded from a class of jobs or a broad range of jobs across various classes.

App. 50a.

None of these factors are in every case required but are all relevant factors. The en banc court below ignored all of these facts regarding the plaintiff's personal characteristics when this court's holding in *Murphy* dictates that such factors must be considered.

Further, the lower court's decision is contrary to the principles established by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The issue of whether Duncan was disabled was a mixed question of fact and law and the jury's verdict should not have been overturned. The Court of Appeals below was required under *Reeves*, to look at all of the evidence in the record. Id at 2110. The en banc court failed to do so by ignoring the evidence regarding Duncan's education, work history and skills and his employment post-termination. All of these facts showed his lower back impairment was a "significant barrier to employment."

CONCLUSION

In sum, this Court must grant this Petition to clarify the proof requirements by Courts pursuant to this Court's decisions in *Sutton*, *Murphy*, and *Reeves*. These conflicts provide a sufficient basis for granting the petition. See S. Ct. Rule 10(c).

Respectfully Submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 1999 Decided January 28, 2000

No. 99–7073

JIMMY L. DUNCAN,
APPELLEE

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 95cv02360)

Bruce P. Heppen argued the cause for the appellant. *Cheryl C. Burke* and *Robert J. Kniaz* were on brief for the appellant.

Bruce M. Bender argued the cause for the appellee. *Suzanne L. Lawrence* entered an appearance.

Before: EDWARDS, *Chief Judge*, SILBERMAN and HENDERSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Dissenting opinion filed by *Chief Judge* EDWARDS.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Washington Metropolitan Area Transit Authority (WMATA) challenges the district court's denial of judgment as a matter of law on the claims Jimmy Duncan brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* (1994), and for which a jury returned a verdict awarding Duncan $250,000 in compensatory damages: $125,000 for the "decision not to reasonably accommodate [him]" and $125,000 "as a result of [WMATA's] decision to terminate [him]." Judgment on the Verdict, ¶¶ 7, 8. WMATA also challenges two post-trial orders granting attorney's fees and costs and one post-trial order granting backpay and prejudgment interest.

We conclude that Duncan failed to establish he was disabled and thus protected under the ADA and, therefore, reverse the district court's order denying judgment as a matter of law. We also vacate the jury verdict and the post-trial orders noted above.

I.

Duncan, forty-seven years old at the time of trial, attended high school and trade school in electronics but completed neither. He has an employment history of unskilled labor positions, many requiring heavy lifting. He began working for WMATA in May 1986 as a custodian, a position that required him to lift between 75 and 100 pounds. Duncan then became an Automated Fare Collector (AFC) parts runner in November 1991. He testified that 30 pounds was the heaviest lifting required and his testimony was corroborated by that of a co-worker. In early December 1992, as a result of another employee's grievance, Duncan was transferred involuntarily to the Elevator/Escalator branch (ELES) into a position requiring heavy lifting.

From 1989 to 1992 Duncan sustained several back injuries including an off-duty automobile accident in February 1992. Some of the injuries required a number of weeks away from work or on light duty but in each instance Duncan was able to return to work without restriction. On December 16, 1992, working his third night in ELES, Duncan re-injured his back. Duncan reported the injury to his supervisor, John Weston, who referred him to WMATA's Associate Medical Director, Dr. Mary O'Donnell. Duncan also saw his orthopaedist, Dr. Harvey N. Mininberg. At that time, Dr. Mininberg limited Duncan's lifting to no more than 20 pounds. *See* Joint Appendix (JA) 60. After another visit in late January 1993, Dr. Mininberg confirmed the restriction. *See id.* 61.

The medical restriction precluded Duncan from returning to his job in ELES. Weston told Duncan that no light duty position was available in ELES and Duncan was placed on leave without pay. Between December 1992 and August 1993 Duncan periodically contacted Weston and Weston's supervisor to inquire about light-duty work. Duncan also applied for two vacancies in his former AFC position, one in March and the other in July. Apparently Duncan's first application was not forwarded to the decisionmaker, Charles Beuttner, but the second was. Beuttner declined to interview Duncan for the second position after learning that Duncan was in the process of being terminated, *see infra*, and was "physically disqualified." JA 307–08.

In mid-August 1993 Duncan received a letter from Weston requesting that he schedule an appointment with Dr. O'Donnell and take with him all medical records dating from February 1993 relevant to restrictions on duty as a parts runner, including a statement from his treating physician regarding his current condition. Duncan returned to Dr. Mininberg who referred him to a neurologist he had seen before, Dr. Najmaldin Karim. Dr. Karim was out of town until September 1993. At his August 23 appointment with Dr. O'Donnell, she was annoyed by his failure to bring the requested information, told him to leave and said that he likely would lose his job. Ultimately, Dr. Karim issued the requested letter of evaluation on September 10, 1993. The

letter stated that Duncan could not perform heavy lifting but could work in the AFC position. Believing WMATA already had decided to fire him, however, Duncan never submitted the letter to WMATA. Weston had drafted a letter of termination on August 31, citing failure to respond to requests from WMATA's medical office but the letter was not sent until October 7, 1993.

Due to his impairment, Duncan could not perform any of the jobs he had had before being employed by WMATA. He inquired about some truck driving positions and eventually acquired a light-duty, part-time position at Hertz Corporation where he earned less money than he had earned with WMATA.

II.

We review *de novo* the trial court's denial of a motion for judgment as a matter of law or, in the alternative, for a new trial. *See Curry v. District of Columbia*, 195 F.3d 654, 658–59 (D.C. Cir. 1999). We will not disturb a jury verdict "unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Id.* at 659 (quoting *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998)). Evidence supporting the verdict, however, must be "more than merely colorable; it must be significantly probative." *Id.* (quoting *Smith*, 135 F.3d at 782).

In an ADA case with no direct evidence of discrimination and where the defendant denies that its decisions were motivated by the plaintiff's disability, this court uses the familiar burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Marshall v. Federal Express Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997). Under that framework, an ADA plaintiff must prove that "he had a disability within the meaning of the ADA, that he was 'qualified' for the position with or without a reasonable accommodation, and that he suffered an adverse employment action because of his disability." *Swanks v. WMATA*, 179 F.3d 929, 934 (D.C. Cir. 1999). Thus "the threshold issue is whether

plaintiff had a 'disability.'" *E.g., Weber v. Strippit, Inc.*, 186 F.3d 907, 912 (8th Cir. 1999); *accord Smith v. Midline Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999).

The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[1] 42 U.S.C. § 12102(2)(A). In analyzing whether a plaintiff has established a disability under this provision, the United States Supreme Court follows three steps: (1) it considers whether the plaintiff's condition was a physical impairment; (2) it identifies the life activity upon which plaintiff relies and determines whether it constitutes a major life activity under the ADA; and (3) it decides whether the impairment substantially limited the major life activity. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The parties to this appeal agree that Duncan's degenerative disc disease was a physical impairment and that "working" is the activity involved and that it is a major life activity under the ADA. *See, e.g.*, Brief of Appellant, at 16; Brief of Appellee, at 15–19. Therefore, the issue is whether Duncan's back impairment substantially limited his ability to work. The Supreme Court recently considered what "substantially limits" means in the context of one's ability to work in *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150–51 (1999). The Court first noted that the term "substantial[ ]" suggests "considerable" or "specified to a large degree." 119 S. Ct. at 2150. It noted the definition of "substantially limits" as "unable to perform" or "significantly restricted" contained in the regulations of the Equal Employment Opportunity Commission (EEOC). *Id.* at 2150–51 (quoting 29 C.F.R. §§ 1630.2(j)(1)(i), (ii) (1998)). The Court then clarified what a plaintiff must show to demonstrate that an impairment substantially limited his ability to work:

> When the major life activity under consideration is that of working, the statutory phrase "substantially limits"

[1] The ADA also protects individuals who have "a record of such an impairment" and those whose employers "regard[ ] as having such an impairment." 42 U.S.C. § 12102(2). Duncan makes no claim under either alternative approach.

> requires, at a minimum, that plaintiffs allege they are unable to work *in a broad class of jobs*.... To be substantially limited in the major life activity of working, then, one must be *precluded from more than one type of job*, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Id. at 2151 (emphasis added). The *Sutton* Court stressed that "whether a person has a disability under the ADA is an individualized inquiry," *id.* at 2147 (citing *Bragdon*, 524 U.S. 624), and noted several factors courts "should consider" when making this determination, including the accessible geographical area and the number of similar jobs within that area from which the individual also is disqualified. *Id.* at 2151. Ultimately in *Sutton*, the Court held that the plaintiffs' disqualifications from their current jobs due to impairment did not establish that they were substantially limited in their ability to work, particularly where other jobs utilizing their skills were available to them. *See id.*

Claiming he presented evidence sufficient to sustain the jury verdict, Duncan points to the testimony of Drs. Mininberg and Karim that his degenerative disc disease was a permanent condition necessitating a permanent restriction on lifting, as well as his educational background, lack of skills, lack of experience outside heavy labor and inability to find similar employment. Duncan also cites the EEOC's interpretive guidelines which the Supreme Court noted in *Sutton* and which provide in part:

> [A]n individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable

> qualifications to perform those same jobs. *For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.*

29 C.F.R. Pt. 1630.2(j), App. (emphasis added).

WMATA insists that Duncan failed to prove his degenerative disc disease substantially impaired his ability to work. While conceding that Duncan, through medical testimony, established a lifting restriction of approximately 20 pounds,[2] WMATA argues he did not establish, as he must, that he was thereby disqualified from a "broad class of jobs" as *Sutton* instructs. WMATA cites Duncan's failure to proffer expert testimony from a vocational rehabilitation specialist and testimony or statistical evidence regarding the numbers of jobs from which he was disqualified. Other than relying on his limited educational background and work experience, Duncan offers only his testimony that he inquired about some truck driving positions.

Other circuits have addressed claims involving arguments similar to Duncan's and have found the claims faulty for lack of evidence regarding the jobs the plaintiffs' impairments preclude them from performing.[3] In *Colwell v. Suffolk Coun-*

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[2] Dr. Karim's September 1993 evaluation, which Duncan did not submit to WMATA, and the testimony of both doctors at trial indicated that the previous 20–pound restriction was a good guideline but that Duncan could also lift somewhat heavier objects.

[3] The dissent cites cases from other circuits finding triable issues of fact on records arguably similar to the record here. Most of those cases predate *Sutton*, however. *See* Diss. Op. at 8–11. The one case the dissent cites which was decided after *Sutton*, *Wellington v. Lyon County School District*, 187 F.3d 1150 (9th Cir.1999), did not cite *Sutton*. A later opinion from that circuit, *Broussard v. University of California*, 192 F.3d 1252 (9th Cir.1999), does cite *Sutton* and is consistent with our resolution here. In *Broussard*

ty Police Department, 158 F.3d 635, 644–45 (2d Cir. 1998), the Second Circuit held that the plaintiffs, who complained of limitations resulting from back injuries, failed to show they were significantly restricted from working in a class or broad range of jobs. With regard to one plaintiff, the court said that "[w]ithout specific evidence about the kinds of jobs from which [an] impaired individual is disqualified, the jury could not perform the careful analysis that is necessary to determine that [plaintiff] was substantially limited in his ability to work." 158 F.3d at 645 (internal quotation marks omitted). *Accord Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997). Similarly, in *Bolton v. Scrivener, Inc.*, 36 F.3d 939 (10th Cir. 1994), the court examined the medical evidence tending to establish that the plaintiff suffered from a permanent partial disability but held it insufficient. Noting that such evidence "does not address [plaintiff's] vocational training, the geographical area to which he has access, or the number and type of jobs demanding similar training from which [he] would also be disqualified," the Tenth Circuit found the medical evidence relevant to the nature, severity, duration and impact of the injury but insufficient to show how plaintiff's ability to perform a class or broad range of jobs was affected. *Bolton*, 36 F.3d at 944. *See also Muller v. Costello*, 187 F.3d 298, 313 (2d Cir. 1999) (plaintiff's failure to present evidence that he was precluded from jobs other than correctional officer in his geographic area and plaintiff's insistence that his class of jobs be limited to correctional

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the court stated that surviving a motion for summary judgment "require[s] at least some evidence from which one might infer that [plaintiff] faced 'significant restrictions' in her ability to meet the requirements of other jobs." *Id.* at 1259 (quoting *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 507 (7th Cir.1998)). Accordingly, the court declared that the existence of a genuine issue of fact turned on its evaluation of the declaration of a vocational rehabilitation specialist, which was "the only evidence which might show that [plaintiff] is barred from significant percentages of available employment in the [geographical] area" because of her impairment. 192 F.2d at 1257. In the end, the court found that the declaration lacked a medical foundation and affirmed summary judgment in favor of the defendant.

officer "compelled" holding of insufficient evidence of substantial limitation on major life activity of working).

Several cases involve a plaintiff with a limitation similar to Duncan's. In *Thompson v. Holy Family Hospital*, 121 F.3d 537 (9th Cir. 1997), the Ninth Circuit addressed a lifting restriction of no more than 25 pounds on a regular basis and more only rarely. The court found the plaintiff failed to prove a substantial limitation despite having established the lifting restriction: "[Plaintiff] points to no evidence that the restrictions . . . preclude her from engaging in an entire class of jobs. Nor does she offer the information relevant to this particularized determination." 121 F.3d at 540. The *Thompson* court also cited decisions from other circuits finding similar lifting restrictions not substantially limiting. *See id.* (citing *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (25–pound lifting limitation, as matter of law, "does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity"); *Aucutt v. Six Flags Over Mid–America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (25–pound lifting restriction did not substantially limit any major life activities); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (plaintiff not substantially impaired by limitation on heavy lifting where he otherwise could lift and reach)); *see also Snow*, 128 F.3d at 1207 ("[A] general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA.").

Duncan attempts to distinguish himself from the plaintiffs in the cases above with the claim that he established substantial limitation by showing he has a limited educational background, is unskilled and has performed only jobs requiring heavy lifting. Duncan's third distinguishing factor deserves little credence in light of his experience as an AFC parts runner, a position that requires no heavy lifting (and that he claims he is able to perform without assistance). On the whole, however, Duncan simply offers no evidence we can weigh in using the factors the Supreme Court tells us to use. The evidence he does offer is his testimony that he inquired about some truck driving positions, *see* JA 136–38, but he

could name no other kind of job he investigated as part of his effort to find employment. *See id.* 138; *see also Sutton*, 119 S. Ct. at 2151 ("If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs.").

In short, Duncan completed only half of the puzzle. He established that he had an impairment that *may have* substantially limited his ability to work but he failed to show that his impairment in fact *did* substantially limit his ability to work. Duncan relied on his limited educational background and the fact that most of his earlier unskilled work involved heavy lifting which he could no longer perform. Duncan, however, did not demonstrate what jobs were available to unskilled workers in his geographical area and thus could not show that his impairment precluded him from performing those jobs.[4] Duncan's limited "search" for another job hardly

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[4] We reject the example included in the EEOC interpretive guidelines regarding an individual with a back condition preventing him from performing heavy labor because it is at odds with *Sutton*. Guiding our consideration—and rejection—of the interpretive guidelines found at 29 C.F.R. Pt. 1630.2(j), App., is the Supreme Court's acknowledgment that "[n]o agency ... has been given authority to issue regulations implementing the generally applicable provisions of the ADA," *Sutton*, 119 S. Ct. at 2145 (citations omitted), coupled with its decision not to reach the issue of what deference, if any, courts owe the EEOC regulations. *See id.* ("Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any."). Although we defer to EEOC regulations where appropriate, *see, e.g.*, *Bell v. Brown*, 557 F.2d 849, 855 (D.C. Cir. 1977) ("[A]n administrative interpretation of a statute by an agency entrusted with its administration commands great deference in the courts."), we decline to do so with its interpretive guidelines where, as here, they lead to a result contrary to the one Supreme Court precedent leads to. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 n.6 (1986) ("EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law."); *see generally Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (weight of agency's interpretation of statute "will depend

informs us what positions were generally available in his geographic area for unskilled workers, much less for workers with a lifting restriction like his. Not only have our sister circuits required this type of evidence but the Supreme Court has told lower courts to consider these factors when making individualized determinations of disability. *See Sutton*, 119 S. Ct. at 2151. The evidence Duncan offered to establish that his impairment substantially limited his ability to work is no more than "merely colorable" and it is not significantly probative. *Curry v. District of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999). Therefore, we find the evidence insufficient to support the jury's necessary finding that Duncan was a person with a disability under the ADA. Accordingly, Duncan's claim fails as a matter of law.

For the foregoing reasons, the order of March 26, 1998 denying WMATA's motion for judgment as a matter of law is reversed. The judgment on the jury verdict entered May 29, 1997 is vacated, as are the district court's post-trial orders awarding attorney's fees and costs and granting Duncan backpay and prejudgment interest.

So ordered.

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upon the thoroughness evident in its consideration, the validity of its reasoning, its *consistency with ... later pronouncements*") (emphasis added). We therefore decline to follow the EEOC's guidelines here.

EDWARDS, *Chief Judge*, *dissenting*: On the record at hand, there was sufficient evidence for the jury to conclude that Mr. Duncan was disabled under the Americans with Disabilities Act ("ADA"). The majority opinion proposes a standard of proof in ADA cases that is unprecedented and unsupported. The case law from our sister circuits does not support the majority's position. And recent Supreme Court decisions construing the ADA cannot be stretched to accommodate the majority's rigid formulation of a plaintiff's burden of proof under the statute. The jury's verdict in this case should stand.

I. ANALYSIS

A. Standard of Review

The defendant claims no legal error—*i.e.*, no alleged improper exclusions or admissions of evidence and no alleged faulty jury instructions. If this case involved legal error that was found not to be harmless, we would merely remand for a new trial pursuant to the correct legal standard. *See, e.g.*, *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) (remanding for a new trial because of erroneous exclusion of evidence). The defendant here seeks much more, however, claiming that the jury verdict should be set aside and judgment entered against the plaintiff for lack of sufficient evidence. In other words, in asking this court to issue a judgment of law in its favor, the defendant seeks to have us " 'intrude[ ] upon the jury's domain.' " *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 640 (D.C. Cir. 1988) (quoting *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225, 1227 (D.C. Cir. 1984)). This is something that a court will rarely do, because neither the trial judge nor an appellate court may " 'usurp[ ] the prime function of the jury as the trier of the facts.' " *Id.* at 646 (quoting *Lind v. Schenley Indus.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc)); *see also Stenograph, L.L.C. v. Bossard Assoc.*, 144 F.3d 96, 100 (D.C. Cir. 1998) (affirming district court's denial of a judgment as a matter of law for defendants); *Burns v. Washington Metro. Area Transit Auth.*, 114 F.3d 219, 221 (D.C. Cir. 1997) (per curiam) (reversing magistrate's grant of a judgment as a matter of law for defendant); *Barbour v. Merrill*, 48 F.3d

1270, 1277 (D.C. Cir. 1995) (affirming district court's denial of defendant's motion for a judgment as a matter of law); *Mackey v. United States*, 8 F.3d 826, 830 (D.C. Cir. 1993) (reversing district court's grant of a judgment as a matter of law for defendant); *Parker v. District of Columbia*, 850 F.2d 708, 711 (D.C. Cir. 1988) (giving jury awards "the utmost of deference and respect") (internal quotation marks omitted). Under well-established case law that is designed " 'to protect the litigants' right to jury trial,' " *McNeal*, 836 F.2d at 647 (quoting *Lind*, 228 F.2d at 90), the courts are strictly limited from either granting a new trial or granting a motion for judgment as a matter of law on the grounds that the jury's verdict was against the weight of the evidence. To this end, the law is clear that a verdict "will withstand challenge unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Swanks v. Washington Metro. Area Transit Auth.*, 179 F.3d 929, 933 (D.C. Cir. 1999) (internal quotation marks omitted), *cert. denied*, 68 U.S.L.W. 3389 (U.S. Dec. 13, 1999). In light of this very narrow standard of review, there is no basis upon which to set aside the jury verdict in favor of Mr. Duncan.

B. The ADA's Approach to Substantial Limitation of the Major Life Activity of Working

The ADA defines a disability as, *inter alia*, "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102(2)(A) (1994). Mr. Duncan's back condition constitutes a physical "impairment" under the statute. The only question at issue here is whether he provided sufficient evidence for a reasonable jury to conclude that his impairment "substantially limits" any of his major life activities.

Equal Employment Opportunity Commission regulations define "major life activities," nonexhaustively, as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1999). Mr. Duncan claims that his back condition

substantially limits his ability to work. The regulations say that, with respect to working, "substantially limits" means

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id. § 1630.2(j)(3)(i).

The regulations also indicate that

> the following factors *may* be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3)(ii) (emphasis added).

The question that we face is whether the "evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree," *Swanks*, 179 F.3d at 933 (internal quotation marks omitted), that Mr. Duncan was not significantly restricted in his ability to perform either a class of jobs or a broad range of jobs. The majority essentially holds that, because Mr.

Duncan provided no quantitative evidence detailing the relevant job market, no reasonable juror could conclude that he was significantly restricted in his ability to perform either a class or a broad range of jobs. In my view, the majority asks too much of an ADA plaintiff, for neither the statute, regulations, nor case law require quantitative evidence of the sort that the majority here demands.

C. The Case Law From Our Sister Circuits

No relevant cases from within this circuit apply to the question before this panel: What quantum of evidence is required simply to reach the jury on the question of whether a plaintiff is substantially limited in the major life activity of working? The relevant law from our sister circuits, however, compels the conclusion that the majority has answered this question incorrectly.

It is beyond peradventure that a plaintiff cannot establish that he is substantially limited in his ability to work simply by showing that he is disqualified from one particular job. *See Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2151 (1999). At the same time, however, courts do not require ADA plaintiffs to prove that almost all jobs are outside their reach in order to avoid summary judgment or a judgment as a matter of law. *See DePaoli v. Abbott Labs.*, 140 F.3d 668, 672 (7th Cir. 1998) ("[A]n employer cannot avoid liability by showing that the employee is still generally capable of doing some economically valuable work in the national economy."). Rather, courts require "at least some evidence from which one might infer that [the plaintiff] faced 'significant restrictions' in her ability to meet the requirements of other jobs." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 507 (7th Cir. 1998) (describing what plaintiff must do to defeat a motion for summary judgment); *see also Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 858 (11th Cir. 1998) ("Although a plaintiff seeking recovery under the ADA is not required to provide a comprehensive list of jobs which she cannot perform, the person must provide some evidence beyond the mere existence and impact of a physical impairment to survive summary judgment.").

In determining what "class of jobs" is relevant for deciding whether the plaintiff is substantially limited in his ability to work, the analysis must focus on the personal characteristics of the particular plaintiff. Thus, a court must reasonably look to a plaintiff's "expertise, background, and job expectations." *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996). Indeed, as one court has commented, "it is not easy to envision how any other approach could be taken." *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 784 (3d Cir. 1998) (adopting approach "under which an individual's training, skills, and abilities are taken into account in determining whether the individual is substantially limited in the major life activity of working").

I can find no decision in which an appellate court has held that an ADA plaintiff *must* present evidence similar to that required by the majority in the instant case. The contrast between the majority's stance and that taken by most other courts is best demonstrated by considering the justifications cited by courts that have granted summary judgment or a judgment as a matter of law for defendants in disability discrimination cases.

An obvious situation in which courts have granted summary judgment or a judgment as a matter of law in favor of a defendant arises where the plaintiff fails to allege exclusion from a sufficiently broad class of jobs. *See Muller v. Costello*, 187 F.3d 298, 313 (2d Cir. 1999) (stating that the category of "correctional officer" was not a "class of jobs" under the ADA); *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 861 (5th Cir. 1999) (finding position of pharmacist not to be a class of jobs); *Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 725–26 (7th Cir. 1998) (finding insufficient evidence of a substantial limitation where plaintiff was only disqualified from one sort of teaching position); *Bridges v. City of Bossier*, 92 F.3d 329, 334–36 (5th Cir. 1996) (finding that the category of firefighting jobs is not a "class of jobs"); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."). This is not the situation here. Mr. Duncan demonstrated, with no

serious dispute, that he was precluded from performing jobs requiring medium, heavy, and very heavy lifting; this is a sufficiently broad class of jobs to satisfy the requirements of the statute. *Cf. Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 303–04 (4th Cir. 1998) (finding maintenance supervisory work to be a class of jobs); *DePaoli*, 140 F.3d at 673 (considering "any assembly line job that required repetitive movement" to be a class of jobs).

Another obvious situation in which courts have found evidence insufficient to go to the jury arises where the plaintiff was able to secure employment similar to that from which he was allegedly disabled. *See Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998) (emphasizing fact that plaintiff found other similar employment in finding no evidence of a substantial limitation in the major life activity of working), *cert. denied*, 119 S. Ct. 1758 (1999); *Patterson*, 150 F.3d at 726 (finding insufficient evidence of a substantial limitation where plaintiff, upon termination, became employed with the Chicago school system); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 200 (4th Cir. 1997) (finding insufficient evidence to defeat a motion for summary judgment where "there is absolutely no indication that Halperin's lifting restriction significantly limits his ability to perform a wide range of jobs" especially where the record showed that Halperin could, and did, "find comparable employment with a different employer"); *Zirpel v. Toshiba America Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (finding no substantial limitation where plaintiff "has had three jobs since her discharge, and she currently holds a quality control position nearly identical to the one she held at Toshiba"); *Gupton v. Virginia*, 14 F.3d 203, 205 (4th Cir. 1994) (finding no substantial limitation where plaintiff "presented no evidence that her allergy [to tobacco smoke] foreclosed her generally from obtaining jobs in her field" and where defendant offered her a position in her field in a nearby office); *see also Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 724 (2d Cir. 1994) (affirming grant of summary judgment for defendant where plaintiff had a master's degree and had been gainfully employed since receiving her degree). In this case, Mr. Duncan and his physicians testified that he

was unable to perform jobs similar to that from which he was fired. After moving out of his apartment because of his inability to pay rent, Mr. Duncan eventually took a part-time light-duty job with a rental car company in which he earns approximately one-third of his previous salary.

The majority focuses attention, however, on a few decisions that mention a lack of quantitative evidence with respect to the relevant job market in holding that a plaintiff failed to offer sufficient proof for a jury to conclude that he or she was disabled. None of these cases can be stretched to support the majority's apparent *per se* requirement that an ADA plaintiff provide quantitative evidence detailing the job market. Rather, they establish the *relevance*, not the *necessity*, of such evidence.

For example, the instant case is easily distinguishable from *Thompson v. Holy Family Hospital*, 121 F.3d 537 (9th Cir. 1997) (per curiam). The *Thompson* court did not treat detailed statistical evidence as a *sine qua non* of an ADA claim, but focused on the plaintiff's failure to provide job market evidence in the face of the defendant's proffer of an affidavit from a vocational counselor stating that the plaintiff, a nurse, remained qualified for a number of registered nurse positions. *See id.* at 540 (noting, in addition, that plaintiff remained employed in the health care industry). The defendant made no such showing here.

Similarly, in *Bolton v. Scrivner*, 36 F.3d 939 (10th Cir. 1994), the court noted the lack of quantitative evidence as well as the lack of any evidence regarding the plaintiff's vocational training and the geographical area to which he had access. *See id.* at 944. The *Bolton* court nowhere suggested that detailed quantitative evidence on the relevant job market was essential to the plaintiff's case. Here, apparently contrary to the plaintiff in *Bolton*, Mr. Duncan did provide testimony regarding his work experience, education, and vocational training.

The *Muller* decision is also distinguishable on its facts. In *Muller*, the defendant had identified several jobs for which the plaintiff remained qualified, and the plaintiff stubbornly

insisted that "correction officer" was a class of jobs. Because the plaintiff presented no evidence that he was precluded from jobs other than correction officer, the court had no real choice but to issue a judgment as a matter of law for the defendant. *See* 187 F.3d at 313.

Finally, the language taken by the majority from *Colwell v. Suffolk County Police Department*, 158 F.3d 635, 645 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999), is not inconsistent with a jury verdict in favor of Mr. Duncan. Unlike the plaintiff in *Colwell*, whose "only evidence concerned the general restrictions imposed by his doctor," *id.*, Mr. Duncan also provided evidence as to his education and vocational history. That the plaintiff in *Colwell* was faulted for not providing evidence of the "kinds of jobs," *id.* (internal quotation marks omitted), from which he was disqualified does not mean that the *Colwell* court expected detailed quantitative evidence of the relevant job market. There is no indication that the Second Circuit would have been dissatisfied if the plaintiff had simply provided more and better qualitative evidence from which a jury could have inferred a substantial limitation in his ability to work.

Most of the decisions from our sister circuits have found a triable issue of fact regarding a plaintiff's disability without even mentioning quantitative evidence detailing the relevant job market. *See Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998) (per curiam) (finding that plaintiff was substantially limited in his ability to work because of depression, post-traumatic stress disorder, and panic attacks, while referring to no quantitative vocational evidence); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (finding genuine issue of material fact regarding whether plaintiff's psoriasis substantially limited her ability to work with no reference to evidence regarding job availability); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 630 (7th Cir. 1998) (finding plaintiff's evidence sufficient to overcome summary judgment where he testified to potential hospitalization due to insulin-dependent diabetes); *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) (finding, in affirming district court's denial of employer's

motion for a judgment as a matter of law, that the jury could have reasonably concluded that plaintiff's depression, testified to by plaintiff and physician, "substantially impaired the major life activity of working," while referring to no evidence regarding classes of jobs for which she was disqualified); *Cline*, 144 F.3d at 303–04 (finding a jury verdict of intentional discrimination under the ADA supportable where plaintiff showed that he was disqualified from maintenance supervisory work, and where the court made no mention of vocational evidence); *Gilday v. Mecosta County*, 124 F.3d 760, 765 (6th Cir. 1997) (finding sufficient evidence to create a question of fact as to whether plaintiff's diabetes is a disability under the ADA because plaintiff's condition made him irritable and unable to cooperate with co-workers, an ability "necessary for all but the most solitary of occupations," without reference to quantitative vocational evidence); *Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997) (finding that summary judgment for defendant was improper even though the record did not show how many jobs plaintiff was disqualified from because of the impairment); *Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996) (finding a genuine issue of material fact as to whether bladder infection resulted in a substantial limitation of working with no reference to testimony about job market); *Pritchard v. Southern Co. Svcs.*, 92 F.3d 1130, 1134 (11th Cir. 1996) (finding sufficient evidence for the case to go to the jury where an engineer suffered symptoms of "marked fatigue, lack of energy, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect, and irritability" that limited her ability to work in nuclear engineering, even though she was able to work as a non-nuclear engineer).

It is notable that most of the reported district court decisions in the foregoing cases also made no mention of quantitative vocational evidence. *See Gilday v. Mecosta County*, 920 F. Supp. 792 (W.D. Mich. 1996); *Baert v. Euclid Beverage, Ltd.*, 954 F. Supp. 170 (N.D. Ill. 1997); *Cehrs v. Northeast Ohio Alzheimer Research Ctr.*, 959 F. Supp. 441 (N.D. Ohio 1997). Indeed, among the foregoing cases, the only reported district court decision that did refer to quantitative vocational evidence considered the evidence to disfavor

the plaintiff. *See Pritchard v. Southern Co. Svcs.*, 1995 WL 338662, at *8–9 (N.D. Ala. Mar. 31, 1995) (finding that plaintiff did not allege sufficient evidence to support her disability claim). Nonetheless, following review, the decision of the court of appeals never even mentions the quantitative evidence in reversing the district court's holding that the plaintiff had not alleged sufficient evidence to reach a jury. *See Pritchard*, 92 F.3d at 1134.

Research indicates that most courts that have considered facts similar to those before this court have concluded that there was sufficient evidence for resolution of the issue by a jury, even where there was no quantitative evidence detailing the relevant job market. In the instant case, Mr. Duncan adduced competent evidence that he was foreclosed from medium and heavy lifting jobs, that he had worked in jobs requiring heavy lifting in the past, that he never graduated from high school, and that he did not have computer training, clerical experience, or office skills. Given this testimony, there was sufficient evidence for the jury to conclude that Mr. Duncan was foreclosed from a class of jobs "utilizing similar training, knowledge, skills or abilities," 29 C.F.R. § 1630.2(j)(3)(ii)(B), to the job at WMATA, for which he was otherwise qualified. *See Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999) (question of fact as to whether plaintiff is disabled exists where plaintiff had a high school degree, his work experience was limited to manufacturing, construction, heavy maintenance and plumbing, and no evidence was presented to suggest that jobs were available for which a person with plaintiff's skills, training, and abilities was qualified); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 11–12 (1st Cir. 1999) (finding sufficient evidence for a jury to find disability because the "inability to lift heavy objects and perform repetitive manual tasks can translate across a broad spectrum of physically demanding jobs," where plaintiff testified as to his limited job experience, education, and skills, and physician testified that plaintiff was precluded from a "lot" of jobs); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996) (finding a genuine dispute of material fact as to whether plaintiff who worked in coal mine was substantially

limited in working where plaintiff provided evidence that he could perform "no overhead work, heavy lifting, or pulling and pushing out from his body," because these restrictions "might apply to a broad range of jobs, and are more than job specific").

In short, the weight of the case law from our sister circuits indicates that the existence of Mr. Duncan's disability should be evaluated based upon his individual characteristics, that he must show that he is disqualified from more than one particular job, and that relevant proof to determine whether he is disabled may include his education, work history, and evidence of the job market. Other courts have been more likely to focus on the inadequacy of quantitative vocational evidence where the defendant has made a showing regarding the plaintiff's eligibility for employment. The defendant made no such showing in this case. Mr. Duncan offered more than enough to have his case heard and decided by a jury. And this court acts beyond its authority in taking the case from the jury.

D. Relevant Supreme Court Case Law

The Supreme Court's recent pronouncements on the ADA do not give cause for this court to second-guess the jury in this case. In *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999), the Court reviewed a grant of summary judgment against an employee who was dismissed from his job as a UPS mechanic because of his high blood pressure. The employee argued in part that UPS regarded him as disabled because of his high blood pressure, alleging that the company regarded hypertension as substantially limiting him in the major life activity of working when, in fact, his hypertension did not limit his ability to work. *See id.* at 2137. The employee was fired from his job because Department of Transportation regulations require that drivers of commercial motor vehicles not have hypertension. *See id.* at 2136. The Court found that, at most, the employee was regarded as unable to perform only one particular job, which is insufficient to show that he is regarded as substantially limited in the major life activity of working. *See id.* at 2138–39. The Court noted that the employee "put forward no evidence that

he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus does not require DOT certification." *Id.* at 2139. It was undisputed, according to the Court, that in fact petitioner was "generally employable as a mechanic." *Id.* This lack of evidence put forward by petitioner combined with the uncontroverted evidence put forth by respondent that he could "perform jobs such as diesel mechanic, automotive mechanic, gas-engine repairer, and gas-welding equipment mechanic" convinced the Court that petitioner was not regarded as substantially impaired in the major life activity of working. *Id.* The Court's decision nowhere suggests that an ADA plaintiff must present quantitative evidence within the rigid formula devised by the majority here in order to demonstrate a substantial limitation in the major life activity.

In *Sutton*, two myopic sisters were rejected from a pilot position because they did not meet United's minimum vision requirement. Their suit was dismissed for failure to state a claim upon which relief could be granted. *See Sutton*, 119 S. Ct. at 2144. The petitioners alleged, *inter alia*, that United mistakenly regarded their physical impairments as substantially limiting them in the major life activity of working. *See id.* at 2150. The Court rejected this argument, again finding that petitioners had only alleged preclusion from one job, that of global airline pilot. *See id.* at 2151. According to the Court,

> [t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Id. After noting that petitioners had only alleged that United regarded them as being ineligible for one particular job, the Court observed that "there are a number of other positions utilizing petitioners' skills, such as regional pilot and

pilot instructor to name a few, that are available to them." *Id.* In *Sutton*, then, as opposed to the instant case, the plaintiffs could only allege exclusion from one particular job, which has long been insufficient to support a claim of disability under the ADA.

The majority attempts to evade the weight of authority from our sister circuits by drawing a line between pre-*Sutton* and post-*Sutton* cases. *See* Maj. Op. at 7 n.3. This attempted distinction is unconvincing absent some explanation as to why quantitative evidence regarding the available job market would be more relevant in a post-*Sutton* inquiry. The majority cites *Sutton*, 119 S. Ct. at 2151, to say that there are several factors courts "should consider" in assessing claims under the ADA, as if to suggest that a plaintiff *must* produce quantitative evidence detailing the relevant job market. *See* Maj. Op. at 6. This is not what *Sutton* says. Rather, in the section of the *Sutton* opinion cited by the majority, the Supreme Court merely notes that

> [t]he EEOC further identifies several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including the geographical area to which the individual has reasonable access, and "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." §§ 1630.2(j)(3)(ii)(A), (B).

Sutton, 119 S. Ct. at 2151. Nothing in the EEOC regulations, however, says that a plaintiff *must* in every case proffer quantitative evidence detailing the relevant job market. Indeed, the relevant regulations both pre-*Sutton* and post-*Sutton* suggest that courts may look to the available job market as one among several relevant factors in evaluating whether or not an individual is disabled. *Sutton* does nothing to change this.

The majority's treatment of post-*Sutton* cases is also unconvincing. *See* Maj. Op. 7 n.3. The majority attempts to diminish the decision in *Wellington* by citing a later decision from the Ninth Circuit, *Broussard v. University of Califor-*

nia, at Berkeley, 192 F.3d 1252 (9th Cir. 1999). The court in *Broussard*, however, found the expert's vocational report to be unreliable for two reasons ignored by the majority: the expert assumed, based on no documented evidence, that the plaintiff had a lifting restriction; and the expert incorrectly assumed that the plaintiff could only type for 15 minute intervals when testing had established she could type for 50 minute intervals. *See Broussard*, 192 F.3d at 1258. Obviously, in such circumstances, an expert's testimony should be rejected as unreliable. More importantly, *Broussard* cites *Bolton v. Scrivner* approvingly, indicating the *relevance* of three separate types of evidence for the purposes of establishing a disability: a plaintiff's vocational training, the geographical area to which he has access, or the number and types of jobs from which a plaintiff is disqualified. *See Broussard*, 192 F.3d at 1258 (citing *Bolton*, 36 F.3d at 944).

Significantly, *Broussard* makes it clear that a plaintiff's burden under the ADA is nothing like the test enunciated by the majority in this case. Rather, as the Ninth Circuit notes:

> To defeat the University's motion for summary judgment, Broussard needed to "identify what requirements posed by the class of [animal care] jobs . . . were problematic in light of the limitations that [CTS] imposed on her. This is not an onerous requirement, but it does require at least some evidence from which one might infer that [plaintiff] faced 'significant restrictions' in her ability to meet the requirements of other jobs." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 507 (7th Cir.1998). Broussard has failed to meet this requirement.

Broussard, 192 F.3d at 1259. The court's references to "*not an onerous requirement*," "*at least some evidence*," and "*one might infer*" are a far cry from what the majority seeks here.

Finally, and most tellingly, *Broussard* cites *Sutton* merely to say that the plaintiff's "inability to perform the specialized job of animal technician for the transgenic mice does not constitute a substantial limitation." *Id.* The court drew nothing more from *Sutton*.

As one of our sister circuits has observed, in the context of proving a substantial limitation of the major life activity of working, *Sutton* and *Murphy* principally stand for the proposition that an ADA plaintiff must "do more than allege that he is regarded as having an impairment which prevents him from working at a particular job." *Shipley v. City of University City*, 195 F.3d 1020, 1023 (8th Cir. 1999). This is not an earth-shaking notion, nor is it one that shatters the foundation of the ADA. However, that a plaintiff is not "disabled" merely because he or she cannot perform a preferred job is a far cry from saying that, in order to prevail under the ADA, a plaintiff *must* in every case proffer expert testimony from a vocational specialist and statistical evidence regarding the numbers of jobs from which he was disqualified. In adopting this rule, the majority essentially holds that, in order to prevail under the statute, ADA plaintiffs must prove, with quantitative certainty, that almost all jobs are outside their reach. The statute does not require this, nor do the opinions from the Supreme Court. This rigid formulation simply rewrites the statute—something we have no authority to do—and virtually ensures that very few plaintiffs will ever prevail under the ADA in this circuit.

II. Conclusion

The jury's verdict in this case should stand. Under the very narrow standard of review that controls this court in this case, there is no basis upon which to take the case from the jury. The judgment of the District Court should be affirmed.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued En Banc September 27, 2000

Decided March 2, 2001

No. 99–7073

JIMMY L. DUNCAN,
APPELLEE

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 95cv02360)

Bruce P. Heppen argued the cause for the appellant. *Cheryl C. Burke*, *Robert J. Kniaz* and *Mark F. Sullivan* were on brief.

Sally Dunaway and *Melvin Radowitz* were on brief for *amici curiae* American Association of Retired Persons and

National Employment Lawyers Association. *Paula A. Brantner* entered an appearance.

Ann Elizabeth Reesman was on brief for *amicus curiae* Equal Employment Advisory Council.

Bruce M. Bender argued the cause for the appellee. *Suzanne L. Lawrence* entered an appearance.

Bill Lann Lee, then Assistant Attorney General, *Jessica D. Silver* and *Thomas E. Chandler*, Attorneys, United States Department of Justice, *Philip B. Sklover*, Associate General Counsel, and *Barbara L. Sloan*, Attorney, Equal Employment Opportunity Commission, were on brief for *amici curiae* United States of America and The Equal Employment Opportunity Commission.

Before: EDWARDS, Chief *Judge*; SILBERMAN,* WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* RANDOLPH, with whom *Circuit Judges* WILLIAMS and SENTELLE join.

Concurring opinion filed by *Circuit Judge* TATEL.

Dissenting opinion filed by *Chief Judge* EDWARDS.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Appellant Washington Metropolitan Area Transit Authority (WMATA) challenges the district court's denial of its post-trial motion for judgment as a matter of law in this discrimination action brought by appellee Jimmy Duncan under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, (ADA). Because Duncan offered no significantly probative evidence below of the number and types of positions available in his local job market so as to demonstrate that his back impairment substantially limits his ability to work, we hold that he

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* Judge Silberman took senior status on November 1, 2000 but continues to participate as a member of this *en banc* court pursuant to 28 U.S.C. § 46(c)(2).

failed to establish he was "disabled" under the ADA. The district court therefore erred in denying WMATA's motion.

Duncan worked at WMATA for seven years. He began his career there as a custodian in May 1986 and became an Automated Fare Collector (AFC) parts runner in November 1991. In December 1992 Duncan was involuntarily transferred to the Elevator/Escalator branch [ELES] where he was again employed as a parts runner. As a custodian, Duncan was required to lift between 75 and 100 pounds, as an AFC parts runner only about 30 pounds and as an ELES parts runner over 100 pounds. On December 19, 1992, his third night in ELES, Duncan, who had suffered a series of back injuries between 1989 and 1992, reinjured his back. As a result he was unable to continue in his heavy lifting ELES job. Duncan's supervisor informed him no light lifting jobs were then available and Duncan was placed briefly on sick leave and then on leave without pay. He twice applied for a vacant AFC parts runner position, in March and July 1993, but without success.

In August 1993 Duncan received a letter from his supervisor instructing him to meet with WMATA's Associate Medical Director, Dr. Mary O'Donnell, and to take with him all of his relevant medical records, including a statement from his treating physician. Duncan consulted his treating physician who referred him to a neurologist. Because the neurologist was out of town, Duncan was unable to obtain a statement from him before his August 19, 1993 meeting with O'Donnell. At the meeting O'Donnell told Duncan he would probably be discharged, apparently because he had failed to produce documentation of his current condition. Duncan was discharged in October 1993. In February 1994 he took a part-time light lifting position with Hertz Corporation.

On December 22, 1994 Duncan filed suit in the district court alleging WMATA violated the ADA by discharging him on account of a disability and by failing to reasonably accommodate his disability. After a five-day trial the jury returned a verdict on May 27, 1997, finding WMATA violated the ADA as alleged and awarding Duncan compensatory damages of $125,000 on his wrongful termination claim and $125,000 on

his reasonable accommodation claim. WMATA filed a post-trial motion for judgment as a matter of law or, alternatively, for a new trial. The district court denied the motion in a memorandum opinion and order filed March 26, 1998. In subsequent orders the court awarded Duncan reinstatement with back pay, attorney's fees and costs and pre-trial interest. On appeal WMATA challenges the denial of its post-trial motion and the various awards.

"This court reviews *de novo* the trial court's denial of a motion for judgment as a matter of law or, in the alternative, for a new trial." *Curry v. District of Columbia*, 195 F.3d 654, 658–59 (D.C. Cir. 1999) (citing *Swanks v. WMATA*, 179 F.3d 929, 933 (D.C. Cir. 1999)). We will not disturb a jury verdict "unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Id.* at 659 (quoting *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998)). Evidence supporting the verdict, however, must be "more than merely colorable; it must be significantly probative." *Id.* (quoting *Smith*, 135 F.3d at 782). Applying this standard, we conclude Duncan failed to produce significantly probative evidence that he was "disabled" under the ADA and that the verdict and awards below must therefore be vacated.

In an ADA case with no direct evidence of discrimination and where the defendant denies that its decisions were motivated by the plaintiff's disability, this court applies the familiar burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Marshall v. Federal Express Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997). Under the *McDonnell Douglas* framework an ADA plaintiff must prove that "he had a disability within the meaning of the ADA, that he was 'qualified' for the position with or without a reasonable accommodation, and that he suffered an adverse employment action because of his disability." *Swanks v. WMATA*, 179 F.3d 929, 934 (D.C. Cir. 1999). The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102(2)(A). Through-

out this litigation, Duncan has maintained that his degenerative disc disease, which limits his lifting to no more than 20 pounds, fits this definition because it is a physical impairment that limits his major life activity of "working." WMATA responds that Duncan failed to establish at trial that his back condition in fact "substantially limits" his ability to work.[1] We agree.

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the United States Supreme Court provided guidance on the meaning of the phrase "substantially limits":

> The ADA does not define "substantially limits," but "substantially" suggests "considerable" or "specified to a large degree." . . .
>
> When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. . . . To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

527 U.S. at 491–92 (citation omitted). This passage makes clear that whether an impairment substantially limits the major life activity of working depends primarily on the avail-

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[1] WMATA concedes that Duncan has a physical impairment and, until its *en banc* brief, did not dispute that working is a"major life activity" under the ADA. In light of our holding that Duncan did not demonstrate his impairment substantially limits his work activity, we need not and do not consider WMATA's belated assertion in its supplemental *en banc* briefs that working is not a major life activity but we assume *arguendo* that it is. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (making same assumption, while noting that "there may be some conceptual difficulty in defining 'major life activities' to include work").

ability of jobs for which the impaired person qualifies. The Supreme Court further instructed that this is "an individualized inquiry," *id.* at 483 (citing *Bragdon v. Abbott*, 524 U.S. 624 (1998)), and that courts should consider such factors as "the geographical area to which the individual has reasonable access and 'the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified,' " *id.* at 491–92 (citing & quoting 29 C.F.R. pt. 1630, App. § 1630.2(j)(3)(ii)(A), (B)[2]). In sum, to establish substantial limitation of working activity under the ADA, a plaintiff must allege and prove that in his particular circumstances, taking into account the appropriate factors, his impairment prevents him from performing a "substantial class" or "broad range" of jobs otherwise available to him.

Duncan asserts he sufficiently demonstrated substantial limitation through expert medical testimony that his back condition and lifting restriction are permanent and through evidence of his age, limited skills, education and experience and of his inability to find comparable employment after his discharge. The cited evidence tells us little or nothing, however, about the number and types of jobs in the Washington, D.C. area for which Duncan is qualified and which are therefore available to him. There may be numerous local positions that do not require heavy or medium lifting—such as the AFC parts runner position at WMATA for which Duncan twice applied after his injury and for which he acknowledges in his complaint he was qualified. *See* Amended Complaint at 3, 4 (filed March 6, 1996). Or there may be very few such jobs. The jury was left in the dark with no significantly probative evidence addressing the factors set out in *Sutton*.[3] Duncan points to his own testimony that he made "inquiries" about or applied for truck driving jobs but that

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[2] The *Sutton* Court declined to resolve whether deference is owed to the Equal Employment Opportunity Commission's ADA regulations, 527 U.S. at 480, but quoted this regulation's factors approvingly, *id.* at 491–92.

[3] We note that social security disability cases have found lifting restrictions not to constitute a disability. *See, e.g., Cruze v. Chater*,

they all required heavy lifting.[4] This sparse anecdotal evidence, however, cannot support the required jury finding that Duncan was substantially limited in his ability to find work because his impairment disqualified him from a substantial class or broad range of jobs in the Washington area. At most Duncan's testimony shows that he was not qualified for the particular kind of job—truck driver—for which he chose to apply. It tells us nothing about whether he was qualified for the many other jobs in the Washington metropolitan employment pool. See *Sutton*, 527 U.S. at 492 ("To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice."). Without evidence of the number and kinds of jobs available to Duncan the jury had no basis to find he was disqualified from a substantial class or broad range of them. Because Duncan failed to offer evidence demonstrating he was substantially impaired in working, the jury's liability verdict cannot stand.

In concluding that Duncan failed to meet his evidentiary burden, we hold that the ADA requires a plaintiff in Duncan's

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85 F.3d 1320, 1322 (8th Cir. 1996) (affirming denial of benefits to claimant who "possessed the residual functional capacity to perform the physical exertional and nonexertional requirements of work except for lifting and carrying of more than 20 pounds occasionally or 10 pounds frequently" and who, according to a vocational expert, therefore "could still perform work as a light cleaner, office helper or messenger, or mail clerk," which positions "exist in significant numbers in the national economy"); *Lee v. Sullivan*, 988 F.2d 789, 792 (7th Cir. 1993) (affirming denial of benefits to claimant based on vocational testimony that person "with a tenth grade education, average to borderline intellect, and depression who can perform sedentary work with an option for alternate sitting and standing . . . could be a cashier in a convenience store, a security guard, and a parking lot attendant" and that "there were approximately 1,400 of these positions in the greater Milwaukee metropolitan area which has a work force of 750,000").

[4] Duncan testified he could not remember "any other types of jobs or specifics about any types of jobs that [he] applied for." Joint App. 136–38.

position to produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range. *See Sutton*, 527 U.S. at 491–92. The approach we adopt is consistent with most other circuits'. *See Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 32–33 (1st Cir. 2000) (concluding former flight attendant failed to show temporary hearing loss was disability under ADA because she offered "no evidence of how many jobs call for this ability, or that she was precluded from any class of jobs"); *Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991, 997 (7th Cir. 2000) (upholding summary judgment against psychologist suffering from severe asthma, osteoporosis, and a weakened immune system because he "ha[d] not presented evidence that his condition prevents him from performing a class of jobs"); *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000) (concluding former cashier with 40 hour week and 10 pound carry limit did not establish disability because she "presented no evidence to create a genuine issue of material fact about whether she could perform a class of jobs with her restrictions") (citing *Berg v. Norand Corp.*, 169 F.3d 1140, 1145 (8th Cir. 1999); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 617–18 (8th Cir. 1997)); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998) ("Without specific evidence about 'the kinds of jobs from which [an] impaired individual is disqualified,' the jury could not perform the careful analysis that is necessary to determine that [a plaintiff] was substantially limited in his ability to work.") (quoting *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994)); *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) (holding "general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA" with regard to major life activity of working); *see also Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996)

("hold[ing], as a matter of law, that a twenty-five pound lifting limitation—particularly when compared to an average person's abilities—does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity"); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) ("[I]nability to perform heavy lifting does not render a person substantially limited in the major activities of lifting or working."); *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997) (holding woman with carpal tunnel syndrome and 20–pound lifting not disabled because "at best, her evidence supports a conclusion that her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than ten pounds"). *But see Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999) (holding evidence that impairment disqualified plaintiff from "metal fabrication, welding, ... heavy activities, carpentry, ... the use of a variety of tools to do maintenance and repairs, et cetera" coupled with his anecdotal testimony he had to quit one plumbing job because he was "in too much pain to even continue" raised triable issue of fact on disability); *cf. Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247 (6th Cir. 2000) (upholding determination plaintiff was disabled because of district court's finding impairment "precluded him from performing at least 50% of the jobs that he was qualified to perform given his educational background and experience" where finding was apparently based solely on 23–pound lifting limit and limited education and work experience); *Mullins v. Crowell*, 228 F.3d 1305, 1314 n.18 (11th Cir. 2000) ("[E]xpert vocational evidence, although instructive, is not necessary to establish that a person is substantially limited in the major life activity of working. Furthermore, a plaintiff could testify from his or her own extensive job search whether other jobs that he or she could perform were available in the geographical area."). Further, the evidentiary burden we place on plaintiffs is not onerous. They need not necessarily produce expert vocational testimony, although such evidence might be very persuasive. In the proper case simple government job

statistics may suffice.[5] We leave it to counsel in future ADA cases to explore the various forms such evidence may take. Here we hold only that Duncan failed to produce any sort of significantly probative evidence on the subject.

For the preceding reasons, we reverse the district court's denial of WMATA's motion for judgment as a matter of law. We further vacate the judgment on the jury verdict entered May 29, 1997 and the district court's post-trial orders awarding reinstatement, back pay, attorney's fees and costs and prejudgment interest.

So ordered.

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[5] Such statistics are readily available on the worldwide web. For example, a number of different reports on job requirements in specific local labor markets are available at low cost from the website www.occustats.com.

RANDOLPH, *Circuit Judge*, with whom *Circuit Judges* WILLIAMS and SENTELLE join, *concurring*: I agree with Judge Henderson's opinion for the court. Although I also agree that the court should not decide whether working is a "major life activity" within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(2), *see* maj. op. at 5 n.1, I think we should recognize the difficulties the issue presents.

The Supreme Court in *Sutton v. United Air Lines*, 527 U.S. 471, 492 (1999), also avoided deciding the question by "[a]ssuming without deciding that working is a major life activity...." The Court's statement indicates that it thought the question was an open one. Before *Sutton* this was far from certain. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a case arising under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, stated in dicta that a person could be considered a handicapped individual if the person suffered from a physical impairment such as cosmetic disfigurement. Even though this sort of impairment "might not diminish a person's physical or mental capacities," it "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. To support its point, the Court cited regulations implementing the Rehabilitation Act, which listed "working" as a major life activity. *Id.* at 283 n.10.

A section of the ADA provides that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 ... or the regulations issued by Federal agencies pursuant to such titles." 42 U.S.C. § 12201(a). On the basis of this section, *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), held that the Court must "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."

There may be ways of explaining the apparent inconsistency between *Sutton* on the one hand, and *Bragdon* and *Arline* on the other. *Sutton*, for instance, referred to EEOC regulations suggesting that "working be viewed as a residual life activity, considered, as a last resort, only '[i]f an individual is not substantially limited with respect to any other major life

activity.' " 527 U.S. at 492 (emphasis omitted) (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)). Sutton also identified "a conceptual difficulty": if a person claims to be excluded from work because of his impairment, it is circular for him to answer—when asked the nature of his impairment—"exclusion from work." *Id.*

Another set of problems stems from these circumstances: to make "working" a major life activity is to create a residual category, one that matters only if the individual is not suffering from some serious physical or mental impairment. (If the individual is so suffering there is no need to consider working as a separate category. *See Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 152 (3d Cir. 1999); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1233 (9th Cir. 1999).) When "working" is used in this way, the existence of a disability will necessarily turn on factors other than the individual's physical characteristics or medical condition. To illustrate, suppose there is an economic downturn and unemployment is high. Then more people will be found to be disabled as compared with a period when the gross domestic product is growing and unemployment is low. Why? Because the less likely it is that a person can find work the more likely that he is substantially limited in the major life activity of working—that in other words he suffers from a disability. *See Sutton*, 527 U.S. at 491. One must wonder whether people considered disabled in a poor economy can become not disabled if the economy turns around and more jobs become available. One must wonder as well how this can be squared with the ADA's express purpose of supplying "clear, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b) (italics added). Geographic disparity also cannot be avoided. Take two identical individuals with identical impairments working for the same company. One works in a sparsely populated rural area, the other in a large metropolis. The individual in the rural area would wind up being classified as disabled under the ADA more readily than the person in the major metropolitan area where more jobs are available.

From the employer's point of view, the standards will hardly appear "clear," 42 U.S.C. § 12101(b). When "working" is the allegedly impaired major life activity, how is the

employer to determine whether the employee is disabled (and thus entitled to a reasonable accommodation)? The employer certainly cannot tell just by looking at the employee, or by consulting medical records, or by insisting upon a physical examination. Disability will depend on the job market, on whether there are jobs in some undefined region "utilizing an individual's skills (but perhaps not his or her unique talents)," *Sutton*, 527 U.S. at 492, jobs for which the employee is qualified. Exactly how the employer is to make that determination is far from certain. Suppose the employer does not acquire the information. Could the employer still be found to have discriminated "because of" a disability, as the ADA requires for liability, if the employer does not know the employee's job prospects? *See* 42 U.S.C. § 12112(a).

The problems just mentioned, and others, need to be considered before we decide whether to join the two other circuits which, after *Sutton*, treat "working" as a major life activity under the ADA. *See Bartlett v. New York State Bd. of Law Exam'rs*, 226 F.3d 69, 80 (2d Cir. 2000); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999).

TATEL, *Circuit Judge*, concurring:

I agree that the verdict in Duncan's favor cannot stand. I write separately to explain my view of the precise nature of the burden that *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), places on ADA plaintiffs.

Sutton describes the standard for proving that an impairment "'substantially limits' ... the major life activity of working":

> When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term "substantially limits" when referring to the major life activity of working:
>
> > "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).
>
> ... To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

527 U.S. at 491–92. This passage gives plaintiffs attempting to prove disability on the basis of a substantial limitation in the major life activity of working a choice: they may demonstrate that their impairment excludes them from "*either* a class of jobs *or* a broad range of jobs in various classes." As the penultimate sentence explains, plaintiffs attempting to prove exclusion from a "class of jobs" must show that their impairment disqualifies them from jobs utilizing their skills. In *Sutton*, for example, the Supreme Court said that airline

pilots who have impairments that preclude them from working as global pilots but who can nonetheless hold "a number of other positions utilizing [their] skills, such as regional pilot and pilot instructor" cannot claim to be substantially limited in the major life activity of working. *Id.* at 493. According to the final sentence in the *Sutton* passage, plaintiffs attempting to prove exclusion from a "broad range of jobs"—the second of the two options—must show that there is not a "host" of different types of jobs available to them. As an example of a person who might claim to be precluded from a broad range of jobs, the EEOC Interpretive Guidance describes an individual who "has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult." 29 C.F.R. pt. 1630, App. § 1630.2(j). Of course, after *Sutton*, such a person would also have to show that jobs not in high rise buildings are unavailable, leaving some doubt as to whether plaintiffs would any longer attempt to make such a claim.

Duncan claimed only exclusion from a class of jobs. To prove his case, Duncan thus needed to show that the class of jobs from which he alleged preclusion was "broad" or "substantial," and not limited to jobs utilizing his "unique talents." *Sutton*, 527 U.S. at 491–92. Presenting evidence of his back injury and lack of formal training or education, he proved only his inability to handle jobs requiring heavy lifting. As I read *Sutton*, he also had to show that he could not handle the broader class of jobs requiring manual labor, of which heavy lifting is but a subclass.

Duncan could have satisfied his burden of proof by producing specific evidence either that he applied unsuccessfully for non-lifting manual labor jobs (thus demonstrating that he was unqualified for those jobs for some other reason) or that most manual labor jobs require heavy lifting. He failed to do either, testifying only as follows:

> Q: When you were on unemployment did you make any inquiries with any employers that had vacancies for truck driver positions to determine if you could do the job?

A: Yes. I would—I would check the vacancies—I mean the unemployment, and I would call places, and jobs that I thought I could do I would ask them what the job entailed, and if it was to the point where I know I wouldn't be able to do a lot of lifting I wouldn't—I wouldn't inquire no more about it.

Q: Did any of the truck . . . driving types of jobs that you applied for, did they require heavy lifting?

A: Yeah, most all of them basically.

. . .

Q: Mr. Duncan, in addition to truck driving positions that you may have made some inquiries about, do you recall any other types of jobs or specifics about any types of jobs that you applied for during that period of unemployment?

A: I can't remember.

Trial Tr. at 130-31 (May 19, 1997). Absent more "significantly probative" evidence, *see Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998), no reasonable jury could have concluded that Duncan was unable to perform manual labor, i.e., that he was excluded from a substantial class of jobs. From his testimony, the jury could have concluded that all truck driving jobs require heavy lifting, but the record contains nothing from which the jury could have concluded that other manual labor jobs likewise require heavy lifting.

While I thus agree that the verdict in Duncan's favor cannot stand, I think it important to emphasize that although *Sutton* requires Duncan to have proven an inability to perform manual labor, it does not also require him to have shown an inability to qualify for non-manual labor jobs in the area in which he lives. *Sutton* would require such evidence of plaintiffs seeking to prove disability based on exclusion from a "broad range of jobs," but that requirement does not apply to plaintiffs like Duncan who seek to prove disability on the basis of exclusion from a "class of jobs." 527 U.S. at 492. Requiring such proof of plaintiffs like Duncan, moreover, would convert the ADA inquiry from asking whether plain-

tiffs are precluded from classes of jobs to whether, as in the Social Security disability benefits context, they are unable to work at all. *See* 42 U.S.C. § 423(d)(1)(A) (defining "disability" under the Social Security Act as "inability to engage in *any substantial gainful activity* by reason of any medically determinable physical or mental impairment") (emphasis added). Consider a surgeon claiming to be disabled under the ADA because a physical or mental impairment precludes him from a class of jobs. Like the airline pilot plaintiffs in *Sutton*, although it would not be enough for the surgeon to show that he could no longer perform surgery—he would need to show that he was unable to practice medicine at all—nothing in *Sutton* requires that he demonstrate the absence of a "host" of non-medical jobs that he could handle, such as office administration, food service, or maintenance. 527 U.S. at 492. In other words, the surgeon could establish disability under the ADA by showing only that, as *Sutton* puts it, "jobs utilizing [his] skills (but perhaps not his . . . unique talents)" were unavailable. *Id.*

So too Duncan. He need not have demonstrated preclusion from non-manual labor jobs; proving exclusion from the class of jobs requiring manual labor would have been enough. Because he failed to show even this, I concur.

EDWARDS, *Chief Judge, dissenting*: Congress passed the Americans with Disabilities Act ("ADA") because, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101 (a)(2)(1994). The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) & (2)(1994).

The ADA generally provides that

> no covered [employer] shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112 (a)(1994). A "qualified individual with a disability" includes persons "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)(1994). And "reasonable accommodation[s]" include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position." 42 U.S.C. § 12111(9)(1994).

In light of the general purposes and standards enunciated in the ADA, appellate review of this case should have been a simple matter. The plaintiff/appellee, Jimmy Duncan, was in a job that *everyone*—including his attending physician, doctors retained by WMATA, and his supervisors—knew that he could not perform *because of his physical disability*. He presented medical evidence of his physical disability to WMATA. When a WMATA job opened up that he could perform, parts runner in Automated Fare Collection, he applied to be transferred to the position. He had held the parts runner job previously; he was indisputably qualified to

perform the job; and the work required was within his current physical ability. He also had seniority among the competing candidates. He was denied the job, however, for no reason. Under the ADA, WMATA should have offered the parts runner job to Duncan, as a reasonable accommodation to his existing disability.

During oral argument before the court, WMATA's counsel was asked to address the following hypothetical:

> Assume an employee is disabled because, due to a freak accident, one of his legs is amputated. As a result of this disability, the employee is unable to perform his job with WMATA. Subsequently, there is a job opening at WMATA in a position that the disabled employee previously has held and is currently capable of performing (because it requires no appreciable standing or walking). The amputee requests a transfer to the job. Is WMATA required to accommodate the disabled employee?

WMATA's counsel conceded that, under the ADA, the employer would be obliged to accommodate the disabled employee by offering him the job. Duncan's request merited an equivalent response.

The problem in this case is that, under the ADA, a disability is defined as "a physical or mental impairment that *substantially limits one or more of the major life activities* of [an] individual." 42 U.S.C. § 12102 (2)(A) (1994) (emphasis added). Congress has delegated to the Equal Employment Opportunity Commission ("EEOC") the responsibility for issuing regulations to enforce the proscription against discrimination in employment under the ADA. 42 U.S.C. § 12116 (1994). In assuming this responsibility, the EEOC has promulgated regulations providing that "major life activities" include

> caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i) (1999). It is fairly easy to determine whether a person is disabled due to a physical impairment that substantially limits his ability to walk. The same cannot

be said about physical impairments (beyond, say, walking, seeing, hearing, speaking, and breathing) that substantially limit a person's ability to work. Thus, the EEOC has explained that the substantial limitation inquiry with respect to "working" entails an inability to work in a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(i).

The disabled employee in the aforecited hypothetical is covered by the major life activity of "walking," so he need only show that his walking is substantially impaired in order to pursue a claim under the ADA. Duncan's ADA claim, however, rests on the major life activity of "working," so he faces a tougher burden. This disparate burden is hard to fathom. Both men are physically impaired and their impairments limit their abilities to work; and both men easily can be accommodated. Nonetheless, Duncan is forced to show that he is unable to work in a broad class of jobs or a broad range of jobs in various classes in order to claim relief, whereas the hypothetical employee need only show an inability to perform a single job. Given the purposes of the ADA and the similarities in the two situations, it is difficult to find a meaningful difference between the hypothetical employee and Duncan. Both the hypothetical employee and Duncan should be accommodated because of their disabilities.

As the majority and separate opinions make clear, however, "working" is a disfavored basis upon which to rest a definition of *major life activities*. Indeed, even the Supreme Court, albeit in dicta, has questioned whether "working" should be considered a major life activity. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). There are undoubtedly some conceptual difficulties in viewing work as a major life activity. For example, an expansive view of work as a major life activity might allow a person to claim a disability and discrimination under the ADA if he/she is allegedly denied work for a physical impairment, such as cosmetic disfigurement, which does not rise to the level of an underlying handicap. In this sense, "work" is arguably over-inclusive when viewed as a major life activity, at least when considered

in conjunction with the principal purposes of the ADA. Nevertheless, it is hard to believe that Congress intended to deny a claimant like Duncan—a truly disabled person, who has undisputed job limitations due to his physical impairment *and can easily be accommodated* (much the same as with the hypothetical employee)—redress under the ADA because his claim rests on "work" as a "major life activity."

The result reached by the majority in this case invariably will make "work" impermissibly under-inclusive when viewed as a major life activity, in a way that appears to defy Congress' mandate in enacting the ADA. The Supreme Court may have some doubts about work as a major life activity, but the Court has not declared the EEOC's regulation unlawful. Unless and until this happens, claimants like Duncan are entitled to full protection of the statute. In short, as long as working is a major life activity, an employer's responsibility to offer a reasonable accommodation to a disabled employee like Duncan should be taken seriously.

I. Analysis

Quite apart from the foregoing analytical problems raised by this case, I respectfully dissent from the judgment of the majority because this is a case that no judge should take from a jury. The jury considered the evidence presented by Duncan and WMATA; there were no erroneous instructions given to the jury; and the jury weighed the evidence and found in favor of the plaintiff. In nullifying the jury verdict, the majority has impermissibly encroached on the jury's important fact-finding function, which is something that neither a trial judge, *see Tri County Industries, Inc. v. District of Columbia*, 200 F.3d 836, 840, 842–43 (D.C. Cir. 2000), *cert. granted*, 68 U.S.L.W. 3774 (U.S. Sept. 26, 2000) (No. 99–1953), nor an appellate panel, *see Boodoo v. Cary*, 21 F.3d 1157, 1161 (D.C. Cir. 1994), is permitted to do.

The majority opinion is especially suspect, because the judgment is based on a re-weighing of the evidence that was before the jury. The case that Duncan presented to the jury

was adequate to survive a judgment as a matter of law, so there is no basis for this court to second-guess the jury. And it is somewhat unnerving to notice that this court showed unbridled solicitude for the jury's role when considering a highly debatable claim in *Tri County Industries* (in which the city of Washington, D.C., was required to pay $5 million on a jury verdict) and now see that same solicitude missing here in a case involving a claim under the ADA.

A. Standard of Review

In considering whether to take a verdict away from a jury and grant a judgment as a matter of law, a court may not substitute its judgment for the jury's judgment in factual determinations. *See Boodoo*, 21 F.3d at 1161 (D.C. Cir. 1994). As the Court recently reiterated, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2110 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Whether a judge is inclined in favor of one possible interpretation of the evidence, over another plausible interpretation of the evidence, is of no moment. This court may enter a judgment as a matter of law only when the evidence presented at trial admits of a single inevitable interpretation. "It is long settled that 'the jury's verdict will withstand challenge unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict.'" *Swanks v. Washington Metro. Area Transit Auth.*, 179 F.3d 929, 933 (D.C. Cir.), *cert. denied*, 528 U.S. 1061 (1999) (quoting *Scott v. District of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996)). This high threshold has not been met in this case. Based on the evidence presented at trial, the jury reasonably determined that Duncan's physical impairment substantially limited him in the major life activity of working. Despite the clear prohibition that a court must not replace a jury as trier of fact, WMATA's case turns on asking this court to re-weigh the evidence. At the very opening of his oral argument,

WMATA's counsel urged this court to weigh the medical reports and physicians' testimony offered at trial so as to find that Duncan was able to perform medium lifting. The argument was one that simply asked this court to make findings of fact against the plaintiff, something that we have no authority to do. Indeed, much of WMATA's argument to this court was presented as if the judges on the appellate bench were in a jury box. As the following analysis indicates, there is no basis here to take this case from the jury.

B. Disability under the ADA

As noted above, under the ADA, a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102 (2)(A) (1994). And EEOC regulations provide that "work" is a major life activity. 29 C.F.R. § 1630.2(i) (1999). Unless and until the Supreme Court decides otherwise, working remains a major life activity under the ADA. *See Mullins v. Cromwell*, 228 F.3d 1305, 1313 (11th Cir. 2000); *Sinkler v. Midwest Property Management, Ltd.*, 209 F.3d 678, 684 n.1 (7th Cir. 2000); *Equal Employment Opportunity Comm'n v. R.J. Gallagher Co.*, 181 F.3d 645, 654–55 (5th Cir. 1999).

EEOC regulations explain that a physical impairment substantially limits an individual's ability to work when the individual is

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). In addition, the following factors may be considered in assessing whether a physical impairment substantially limits a person's ability to work:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types

of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3)(ii).

There is no magical legal standard for measuring substantial limitation. Clearly, the inability to perform lifting does not automatically constitute an impairment that substantially limits a person's ability to work. *See, e.g., Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539 (9th Cir.1997) (holding nurse who was restricted in her ability to lift but was able to work in other nursing jobs was not substantially limited). However, the inability to participate in significant lifting, taken in the context of an individualized analysis, may substantially limit an individual's ability to work. In evaluating substantial limitation, a jury must engage in a context-dependent assessment of the plaintiff's personal characteristics, education, work history, and the available job market in order to assess whether the plaintiff is excluded from a class of jobs or a broad range of jobs across classes. *See, e.g., Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999) (finding issue of material fact exists regarding disability where plaintiff's education was limited to a high school degree and some trade school training, his work experience was limited to manufacturing, construction, heavy maintenance and plumbing, and no evidence was presented that jobs were available in the job market for a person with comparable abilities); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 11–12 (1st Cir. 1999) (rejecting judgment as a matter of law against plaintiff where plaintiff had only a high school education and a work history of heavy physical labor, and physician testified plaintiff was precluded from a lot of jobs); *Mondzelewski v.*

Pathmark Stores, Inc., 162 F.3d 778, 784 (3d Cir. 1998) (explaining that "an individual's training, skills, and abilities are taken into account in determining whether the individual is substantially limited in the major life activity of working"); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (explaining "[a] person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled"); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996) (noting "[t]he physical restrictions Cochrum's physician placed upon him—no overhead work, heavy lifting, or pulling and pushing out from his body—might apply to a broad range of jobs, and are more than job specific").

In this case, the jury was presented with evidence of Duncan's personal characteristics, education, work history, and the available job market in order to assess whether he was excluded from a class of jobs or a broad range of jobs across classes. It does not matter that WMATA disputed some of what Duncan offered; what matters is that there was evidence in the record supporting Duncan's claim. I agree with my colleagues that Duncan did not present the strongest case possible. However, I believe that there was enough before the jury to justify its verdict in his favor.

C. The jury reasonably determined that Duncan was substantially limited in the major life activity of working

There is no serious doubt that Duncan was physically impaired. Dr. Harvey N. Mininberg, an orthopedic surgeon, diagnosed Duncan with degenerative disc disease. *See* Trial Transcript at 18 (May 20, 1997). After he was injured while working for WMATA, Dr. Mininberg authorized Duncan to return to work, with the restriction that Duncan not lift more than approximately 20 pounds. *See id.* at 25. Dr. Najmaldin O. Karim, a neurosurgeon, confirmed both the diagnosis and the lifting restriction. *See id.* at 122, 127. Duncan alleged that this physical impairment substantially limited him in the major life activity of working. Specifically, Duncan claimed that as a result of his physical impairment, he was precluded from the classes of jobs that included medium, heavy, and very heavy lifting.

There was sufficient evidence in the record for a reasonable jury to determine that, based on Duncan's education, training, work history, and efforts to find another job, Duncan's physical impairment substantially limited his ability to work. Duncan never received a high school diploma or completed his GED. He went to trade school for a year and a half, but never finished the training. He had no other formal training or education. He had no computer training. He had no clerical or office skills. He could barely type. *See* Trial Transcript at 127–28 (May 19, 1997).

Duncan was employed in heavy labor jobs throughout his working life. Before working for WMATA, he worked in furniture factories, in a box company, in a glass company, in construction, and in a company that provided the physical settings for functions and meetings. He was a physical laborer. Every one of his jobs involved significant lifting.

After Duncan injured his back while working for WMATA and WMATA terminated him, Duncan sought jobs that were of a light duty nature. Duncan testified that during the nine months he was receiving unemployment compensation, he looked for jobs that were not strenuous. *See id.* at 129. With his back injury, Duncan knew he could not perform the kinds of work he had performed previously. He testified that he could not go back and work as a laborer in construction, or as a packer at a glass company or furniture company, as he had before. *See id.* at 136.

Duncan testified that, in order to receive unemployment compensation, he was required to submit applications in search of other employment. *See id.* at 129. Although he could not recall the specific jobs for which he applied, Duncan testified that during his nine months on unemployment he would check the unemployment listings, and call jobs he thought he could do. He would ask prospective employers what the jobs entailed. If the description of a job included significant lifting that he knew he could not do, he would not inquire further. *See id.* at 130.

Although he wanted to work full time, Duncan was not able to find full-time employment. He ended up accepting a part-

time job with Hertz, moving cars after customers dropped them off. He accepted the job even though it paid $5.75 an hour, approximately one-third what he earned working for WMATA. *See id.* at 135.

As noted above, Duncan should have been offered the parts runner job when it became available. He had performed the job in the past; he was fully qualified and physically able to perform the work; and he had seniority among the competing candidates. WMATA never offered an adequate explanation for its failure to accommodate Duncan, despite knowing of his disability and having a position available for him to perform. Indeed, the only excuses offered by WMATA were that Duncan never furnished medical evidence to support his disability and that Duncan never really sought an accommodation. The jury obviously rejected each of these claims; and, based on the record before us, it is easy to understand this, for WMATA's claims are patently specious.

II. Conclusion

Based on the evidence presented at trial, the jury reasonably determined that Duncan's physical disability substantially limited him in the major life activity of working. The jury verdict should stand and the judgment of the District Court should be affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JIMMY L. DUNCAN,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 95-2360 (GK)
	:	
WASHINGTON METROPOLITAN TRANSIT AUTHORITY	:	
	:	
Defendant	:	
	:	

MEMORANDUM-OPINION

This matter comes before the Court on Defendant's Motion for Judgment Regarding Counts II, III, and IV, or, Alternatively, for a New Trial. Upon consideration of the Motion, the Plaintiff's Opposition, the Defendant's Reply, the applicable case law, and the entire record herein, the Court concludes that the Motion should be denied.

Plaintiff alleged violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12101 *et seq.*, based on a failure to accommodate his disability in the spring and summer of 1993. A jury trial was held from May 19-27, 1997. The jury found that Plaintiff was disabled as of December 16, 1992, within the meaning of the ADA, that the Defendant was motivated by Plaintiff's disability rather than a failure to comply with its Attendance and Sick Leave Rules,

and that there was no mixed motive in the employment decisions to refuse to accommodate his disability and to terminate him. The jury awarded Plaintiff $125,000 in damages for the failure to accommodate his disability and $125,000 in damages for the wrongful termination.

Defendant has now filed a lengthy Motion raising many of the arguments that were raised in pre-trial motions, during the trial, and in closing argument to the jury. The Court will deal with them *seriatim*.

Initially, it is well to keep in mind the applicable legal standards. A motion for judgment n.o.v. may be granted "only if, viewing the evidence most favorable to the Plaintiff and giving him the advantage of every fair and reasonable inference that the evidence permit, there can be but one reasonable conclusion drawn. 'If fair-minded people may differ as to the conclusion, or if there is substantial conflicting evidence, . . . the judgment n.o.v. motion must be denied.' The court must consider all of the evidence offered by the parties, but is should neither assess witness credibility not weigh the evidence . . . 'because a motion for judgment n.o.v. intrudes upon the jury's domain, that question is very narrow.'" *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 827 (D.C. Cir. 1988) (footnotes and citations omitted). These strictures should not be forgotten.

First and foremost, WMATA argues that judgment should be entered in its favor, notwithstanding the verdict, because Plaintiff has failed to prove he is disabled under the ADA. Despite the length and detail of the pleadings filed by the parties, Defendant basically repeats and rehashes his closing

argument. The jury rejected those arguments and accepted the evidence and arguments put forth by Plaintiff.[1]

As Plaintiff argued to the jury, and in this Opposition to the pending Motion, he has introduced sufficient evidence from which the fact-finder could reasonably conclude that his back condition was a physical impairment which substantially limited him in a major life activity, namely working. 42 U.S.C. §12102(2)(A), 29 C.F.R. §1630.2(g)(l), §1630.2(i), and §1630.2(j). In particular, Mr. Duncan established that, given the nature and severity of his degenerative disc condition, its duration, and the long term impact given the fact that it was a permanent condition, he was substantially limited, i.e., "significantly restricted" in his ability to perform either a class of jobs or a broad range of jobs in various classes . . ." 29 C.F.R. §1630.2(j)(3).

Without repeating either Plaintiff's lengthy closing argument to the jury, or all the factual material presented in his Opposition to the pending Motion, the Court will merely note the following evidence introduced by Plaintiff which, considered in its entirety, provides an adequate basis from which a reasonable jury could conclude that he was disabled.

Mr. Duncan had suffered from a prior back condition, from which he had recovered and had returned to work without any restrictions or limitations. On December 16, 1992, he re-injured his back while at work. He saw his orthopedic physician, Dr. Harvey Mininberg, who imposed a 20-pound lifting restriction which he considered to be a permanent restriction. There was ample testimony from both Dr. Mininberg and Plaintiff's neurologist, Dr. Najmaldin Karim, that Mr. Duncan's degenerative disc condition was a permanent

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[1] Defendant did not put on any medical evidence of its own regarding Plaintiff's back condition.

condition, even though it particular symptoms might vary in intensity and duration depending upon the Plaintiff's level of activity. Indeed, the lifting restrictions was never lifted. Both Mr. Duncan and Dr. Mininberg testified that they expected the restrictions to be honored by WMATA.

Given all of this evidence, and without any contrary medical evidence from the Defendant, it was perfectly reasonable for a jury to conclude, as this one did, that Mr. Duncan's condition was permanent, that the 20 pound lifting restriction was permanent, and that - - given Mr. Duncan's lifetime of prior employment in the field of "heavy labor" and his inability to find other employment until he settled for a less remunerative job at Hertz which did not require heavy lifting - - his disability would continue to have a long term impact on his ability to work.

As to whether the Plaintiff was significantly restricted in his ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities, 29 C.F.R. §1630.2(j)(3)(i), it is helpful to look to the Appendix to 29 C.F.R. Part 1630 - - Interpretive Guidance on Title I of the Americans with Disabilities Act. "Such administrative interpretations of the Act by the enforcing agency, 'while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d, 667, 672 (1st Cir. 1995), quoting *Meritor Savings Bank v. Vinson*, 447 U.S. 557, 565 (1986).

The EEOC Interpretive Guidance emphasizes, as have a number of Circuit Court decisions,[2] that the determination as to whether a Plaintiff is severely restricted in their ability to perform a class of jobs or a broad range of jobs in various classes must be made on an individualized case-by-case basis.[3] Moreover, it states very specifically and very pertinently:

> [A] n individual does not have to be totally unable to work in order to be substantially limited in the major life activity of working . . . For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.

29 C.F.R. Pt. 1630, App. at 18.

In sum, given the evidence before the jury regarding Mr. Duncan's permanent degenerative disc condition, his

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[2] *See Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir. 1996); *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996).

[3] What Defendant really seeks is a ruling, as a matter of law, that a 20 pound lifting restriction does not constitute a significant restriction on a person's ability to lift, work, or perform any other major life activity, and cites several cases in support of that proposition. Plaintiff disputes whether those cases, when carefully analyzed, fully support Defendant's position. In any event, none of those cases come from this Circuit's Court of Appeals or even from any trial courts in this Circuit. In the absence of any guiding authority from this Circuit, and in light of case law calling for individualized cases-by-case determinations, this Court is unprepared to rule, as a matter of a law, as Defendant requests.

permanent lifting restriction, his long history of employment in the field of heavy labor, his lack of skills in other areas, and his inability to obtain any other employment, the Court concludes that the jury had sufficient evidence from which it could reasonably conclude that Plaintiff was disabled, and substantially limited in his ability to work, within the meaning of the ADA.

Second, WMATA argues that Plaintiff failed to prove, in light of his lifting restriction, that he was qualified for the position he sought as an accommodation, namely the AFC Parts Runner job.

It is undisputed that Mr. Duncan had previously held and performed this job without any substantial difficulty or assistance from November 1991 through December 1992. There had been no change in the job requirements when he sought return to it as a reasonable accommodation in 1993. Moreover, Plaintiff presented ample evidence from himself and Ms. Barbara Middleton, a co-worker in the AFC section, that they were never required to frequently lift objects weighing 50 to 75 pounds, as WMATA argued. Rather, they testified that, the parts they were required to transport throughout the Metro Rail system weighed less than 50 pounds and that most of them weighed 20 pounds or less. Finally, there was evidence that of the 14 parts that Parts Runner are required to transport, only 4 weighed over 20 pounds, and 3 of the 4 weighed less than 30 pounds.

Whether this testimony was or was not credible, was a question for the jury. It obviously concluded that it was credible. Given the state of this record, there was ample evidence from which a reasonable jury could conclude that Mr. Duncan was qualified to perform the actual job of Parts Runner in the AFC Section, despite the existence of his 20 pound lifting restriction.

Plaintiff has also established, on the basis of facts extensively discussed in its Opposition to the pending Motion, that sufficient evidence was presented to the jury from which it could conclude that Defendant's actions were taken on the basis of Mr. Duncan's disability rather than on the basis of the failure to comply with WMATA's Attendance and Sick Leave Rules. Given this amazingly relaxed attitude toward monitoring of sick leave, the jury could well have rejected Defendant's claim that it suddenly terminated Mr. Duncan because of his failure to provide the documentation requested pursuant to WMATA's Attendance and Sick Leave Rules.

Third, WMATA argues that it is entitled to a new trial because the jury was instructed that it could award damages for future pecuniary (financial) losses.

It is clear under the ADA, whose remedies track those of the Civil Rights Act of 1991, 42 U.S.C. §1981(b)(3), that compensatory damages may be awarded for "future pecuniary losses." They may not be awarded for "front pay" which is equitable relief to be awarded by the court, not the jury. The basis of Defendant's argument is that, because of the size of the verdict, the jury must have included in its award future lost income. This is sheer speculation. It is particularly unreliable speculation given the fact that no only did Plaintiff put on no specific evidence of "front pay" for the jury to even consider, but made it clear over and over throughout the trial that the remedy he really wanted was reinstatement to his old job as a parts runner in the AFC Section. Finally, the jury was given the standard instruction to award damages "only for injuries that the plaintiff proves were caused by defendant's allegedly wrongful conduct." The Court has no basis to presume that its instructions were not followed. In sum, there is no justification for granting a new trial because of the jury instructions.

For all the foregoing reasons, the Court concludes that Defendant WMATA's Motion for Judgment Regarding Counts II, III and IV, or, Alternatively, for A New Trial must be denied.

March 26, 1998
Date

/s/ Gladys Kessler
GLADYS KESSLER
United States District Judge

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Supreme Court, U.S.
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No. 00-1776

IN THE

Supreme Court of the United States

JIMMY L. DUNCAN,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Is a plaintiff who seeks to establish a significant impairment in the major life activity of working required to present quantitative evidence regarding the jobs available in his local employment market, to show that he is disqualified from a substantial class or broad range of jobs?

2. May a plaintiff establish that he is significantly impaired in the major life activity of working by showing that he is unable to perform a narrow type of work, such as heavy lifting, without regard to the number and types of jobs for which he remains qualified in the local employment market?

3. Under the Americans with Disabilities Act, does heavy lifting constitute a class of jobs for purposes of showing a significant impairment of the major life activity of working?

LISTING OF AFFILIATES PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Respondent Washington Metropolitan Area Transit Authority ("WMATA") states that it is an agency and instrumentality of Maryland, Virginia, and the District of Columbia created by an interstate compact, as authorized by Congress. *See* Pub. L. 89-774. WMATA operates a regional transportation system in the Washington, D.C. metropolitan area. As a governmental entity, WMATA does not have any parent corporation, affiliates, or subsidiaries.

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INTRODUCTION

In *Sutton v. United Air Lines*, 527 U.S. 471 (1999), this Court enunciated the requirements for what a plaintiff must show to establish that he has a substantial impairment in the major life activity of working. This Court required that in determining whether a person is substantially impaired in the major life activity of working, lower courts should consider whether a "host of different jobs" are available in his geographical area. *Id.* at 491-92. Petitioner Duncan argues that he should be able to establish that he is a person with a disability simply by showing that he is precluded from a few jobs due to his impairment. Pet. 6, 13, 23. The United States Court of Appeals for the District of Columbia, sitting en banc, requires that a plaintiff present evidence about the numbers and types of jobs in the labor market for which he is qualified and which remain available despite an impairment, in order to determine the extent to which his prospects for employment have been diminished. Pet. 32a. This is entirely consistent with *Sutton* and therefore the petition for a writ of certiorari should be denied.

At trial, petitioner failed to present quantitative evidence regarding the numbers and types of jobs from which he was disqualified as a result of his back impairment. Petitioner failed to present any evidence regarding whether the number of jobs in the Baltimore-Washington area from which he is disqualified is a dozen or is several thousand. As was the case in *Murphy v. UPS*, 527 U.S. 516 (1999), at best Mr. Duncan established that he was disqualified from working at a few isolated jobs, which is not sufficient to establish that he was substantially limited in the major life activity of working. As a result, the D.C. Circuit correctly found that Mr. Duncan could not establish that he had a substantial limitation in the major life activity of working.

Petitioner argues that this case warrants review because he believes the D.C. Circuit adopted a standard of proof contrary to this Court's holdings and in conflict with other federal circuit courts. There is no true conflict among the circuits and the decision below is consistent with the *Sutton* trilogy. Numerous courts, both before and after *Sutton*, have precluded suits or reversed judgments based upon the insufficiency of evidence regarding jobs available in the relevant labor market where the employee claims to be disabled in the major life activity of working.[1] Commentators have reached the same conclusion that labor market data is necessary to establish a significant limitation of the major life activity of working.[2]

The outcome in *Toyota Motor Mfg., Ky., Inc. v. Williams*, *cert. granted*, 69 U.S.L.W. 3665 (U.S. April 16, 2001) (No. 00-1089) is immaterial to further disposition of this case. *Williams* was decided by the Sixth Circuit not on the "difficult concept" of working, but on the rather "simple concept" that the employee is unable to perform manual tasks. *See Williams v. Toyota Motor Mfg.*, 224 F.3d 840,

1. *EEOC v. Rockwell Int'l. Corp.*, 243 F.3d 1012, 1017 (7th Cir. 2001); *see also Dupre v. Charter Behavioral Health Systems*, 242 F.3d 610 (5th Cir. 2001); *Broussard v. University of California*, 192 F.3d 1252 (9th Cir. 1999); *Doren v. Battle Creek Health System*, 187 F.3d 595, 598 (6th Cir. 1999); and *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995).

2. *See* Jeffrey A. Van Detta & Dr. Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev. Litig. 505, 529-531 (2000); Stephen W. Jones, *The Supreme Court Reins In The Americans With Disabilities Act*, 22 U. Ark. Little Rock L. Rev. 183, 196-197 (2000); and *What Does Disability Mean: The Americans With Disabilities Act of 1990 In The Aftermath of Sutton, Murphy, and Albertson's*, 48 Drake L. Rev. 137, 168-69 (1999).

844 (6th Cir. 2000). The question before this Court in that case is whether the Sixth Circuit correctly analyzed *Williams* in terms of a major life activity other than working and correctly found plaintiff Williams to be disabled. In the case at bar, there is no question that the only major life activity at issue is working. The *Duncan* majority relied upon an earlier decision of the Sixth Circuit, *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 372-3 (6th Cir. 1997), which was distinguished by the *Williams* court as involving the major life activity of working. In *McKay*, the Sixth Circuit rejected the argument proffered by petitioner in the case at bar, that a court should only look at the narrow class of jobs from which the employee is disqualified, not at the universe of jobs she can perform, finding that plaintiff was disqualified from a narrow range of assembly line jobs requiring repetitive motion, not from all manufacturing jobs. *McKay*, 110 F.3d at 373. *Williams* will not address the issue which petitioner Duncan seeks to review, the quantum of proof necessary to withstand summary judgment when the major life activity at issue is working.[3]

This Court should decline to grant certiorari in the case at bar for several reasons. First, under *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), decided just a week before the en banc panel issued its decision, federal courts lack jurisdiction over claims against WMATA brought under the Americans With Disabilities Act (ADA),

3. In its petition for certiorari, Toyota challenges the Sixth Circuit's decision to treat a subset of activities relating to working, the ability to perform manual tasks, as limiting a major life activity, asserting that in the Sixth Circuit, a plaintiff "can now simply recast her impairment as a substantial limitation on the major life activity of performing manual tasks." Pet. for Writ of Certiorari at 23, *Toyota v. Williams*, No. 00-1089. Ms. Williams noted that "The Sixth Circuit opinion does not rest on a determination of whether Ms. Williams is substantially limited in the major life activity of working." Opposition to Pet. for Writ of Certiorari at 18, *Toyota v. Williams*, No. 00-1089.

42 U.S.C. § 12101, because WMATA is entitled to Eleventh Amendment immunity under *Hess v. Port Auth. Tran-Hudson Corp.*, 513 U.S. 30, 50 n.20, 52 (1994); *Judy Jones v. WMATA*, 205 F.3d 428, 431-32 (D.C. Cir. 2000); and *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986). Second, the issue presented by the petition would take the Court down a dead end and waste judicial resources. Additional analysis of what constitutes a substantial limitation in the major life activity of working is unnecessary because working is not properly characterized as a major life activity. *See Sutton*, 527 U.S. at 492; and *Duncan*, Judges Randolph, Williams and Sentelle, concurring, Pet. 37a-39a. Finally, whatever standard of proof is adopted, petitioner's case would be dismissed for lack of evidence that he was significantly impaired in any major life activity. Pet. 32a-33a and 41a-42a (Tatel, J, quoting transcript verbatim). To the extent that overarching principles can be supplied to establish the quantum of proof necessary to establish a disability, *Sutton* already provides them.

In addition, there are alternative reasons why WMATA was entitled to judgment as a matter of law. Petitioner's restriction on moderate lifting was temporary rather than permanent, which precludes coverage under the ADA. Moreover, petitioner failed to request reasonable accommodation and otherwise failed to engage in the interactive process.

United States Supreme Court Rule 10 cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." All that is challenged here is the alleged misapplication of the principles enunciated in the *Sutton* trilogy. Review should therefore be denied.

STATEMENT OF THE CASE

Eight of the ten judges of the D.C. Circuit agreed that petitioner offered "no significantly probative evidence below of the number and types of positions available in his local job market so as to demonstrate that his back impairment substantially limits his ability to work." Pet. 28a. These eight judges found that a plaintiff in Duncan's position must

> produce some evidence of the numbers and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range.

Pet. 34a. Judge Tatel, concurring, specifically rejected petitioner's contention that there is a broad class of jobs involving heavy lifting, describing this as simply a subclass of jobs requiring manual labor. Pet. 41a. Three judges wrote a separate concurrence, elaborating upon this Court's critique of the concept of working as a major life activity in *Sutton*, 527 U.S. at 492 (1999). They addressed the anomaly that someone's ability to show a substantial limitation in working will vary with economic conditions in the labor market. Chief Judge Edwards, who dissented from the panel decision, remained the lone dissenter when the matter was decided en banc.

Petitioner distorts the holding below when he asserts that the D.C. Circuit held "that an ADA plaintiff, to show a substantial limitation in working, *must* present statistical quantitative evidence on the numbers and types of jobs available to the plaintiff. . . ." Pet. at 4-5, 24. To the contrary, the D.C. Circuit explicitly held that it would leave it to future

counsel to explore the various forms of evidence which would suffice to show that plaintiff is disqualified from a substantial class or broad range of jobs in the local employment market. Pet. at 36a.

STATEMENT OF FACTS

Petitioner Duncan was employed by WMATA for many years as a janitor. In 1992 he became a parts runner in the Automatic Fare Collection (AFC) section of Metrorail operations. Approximately one year later, he was involuntarily transferred to a position as a parts runner in the elevator/escalator (ELES) section. Parts runners convey spare parts from central storerooms to field locations. Employees assigned to the AFC position must be able to regularly lift equipment weighing as much as 30 lbs., whereas employees assigned to the ELES position must be able to regularly lift equipment weighing as much as 75 lbs. Days after he was assigned to the ELES position in early December 1992, Duncan injured his back. In December 1992 and again in January 1993, he presented WMATA with a medical document indicating that he was subject to a 20 lb. weight limitation. This was not the first time such a temporary restriction had been imposed upon him. There were no light duty jobs available for him and for months he remained on leave without pay, without providing WMATA any information about his medical status. In August 1993 he was asked to provide WMATA with information regarding his medical condition. Although he was seen by his neurosurgeon in September 1993, the doctor's report was never provided to WMATA while Duncan was a WMATA employee. Duncan was terminated for failing to comply with the order that he provide documentation justifying his absence from work.

Contrary to his assertions, petitioner provided no evidence establishing that he had a permanent injury or a permanent 20 lb. lifting restriction. Pet. 8, 16, 25. There was no communication from his doctors to WMATA specifying that the 20 lb. restriction was permanent. Mr. Duncan's September 1993 neurological follow-up with his neurosurgeon, Dr. Karim, indicated that he could return to his prior AFC job which required moderate lifting of approximately 30 lbs. At trial, Mr. Duncan proved that he had a degenerative disc problem which caused periodic bouts of acute pain. He proved the existence of an impairment, but nothing else.

Petitioner mischaracterizes the evidence, asserting that he proved that he was precluded from working in three broad categories of jobs. Pet. 8, 16, 25, 28. Petitioner proved only that he was unable to work in two specific jobs, as a truck driver for an unnamed employer and in WMATA's ELES position. There was specific documentary evidence from Dr. Karim that he could perform the job of AFC parts runner, a moderate lifting job. Petitioner presented no evidence at trial that "heavy lifting" constitutes a category of jobs. The strength classifications of jobs established by the Department of Labor (DOL) in 20 C.F.R. § 404.1567, upon which he now relies (Pet. 9), used in analyzing jobs in the authoritative Dictionary of Occupational Titles, do not constitute classes of jobs for purposes of the ADA. Moreover, there was no proof before the jury regarding the DOL job classifications. Even if the strength classifications could establish classes of jobs, here the DOL classifications are the creation of appellate advocacy — they were not introduced as evidence at trial or through instructions for the jury. At trial, the record was entirely silent regarding the class of jobs from which Mr. Duncan was physically disqualified.

Petitioner mischaracterizes his work history by alleging that he has a history of performing only unskilled labor jobs involving heavy lifting. Pet. 8, 12, 28. His work history was limited to performing unskilled manual labor. His sparse testimony gave no indication of whether his prior work, e.g., banquet set up and box making, required heavy, medium or light lifting. His penultimate work for WMATA, as a parts runner in Automatic Fare Collection, involved medium, not heavy, lifting. At trial, Duncan's proof contradicted his present assertion that his experience limited him to heavy lifting work.

Petitioner never requested reasonable accommodation. Pet. at 9. He requested light duty, a temporary status for employees who are receiving workers compensation, which provides them with temporary placements based upon the expectation that they will return to their former job. Light duty is a bridge back to one's most recent job, not a means to obtain a permanent new position. While he was ostensibly disabled, petitioner applied for the permanent vacant AFC parts runner job through competitive procedures, stating that he was fully capable of performing the job.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS IN *SUTTON*, *ALBERTSON'S* AND *MURPHY*.

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) considered the issue of whether there were sufficient facts for plaintiff to survive summary judgment. Below, the Ninth Circuit had rejected the argument that the employee was not "substantially limited," finding the ADA did not merely protect those with the most severe disabilities. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1233 (9th Cir. 1998).

This Court held that the Ninth Circuit had "undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Albertson's*, 527 U.S. at 565. The Court held that those claiming protection under the ADA must "prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial." Like the plaintiff in *Albertson's*, Mr. Duncan has failed to adduce sufficient facts that his physical condition significantly constrained his ability to find work. Mr. Duncan's case fails because he presented no evidence regarding the labor market generally and only scant evidence regarding his own efforts at finding employment.

In *Sutton*, 527 U.S. at 483, this Court noted that the definition of "disability" requires a determination of whether a particular impairment substantially limits the "major life activities of such individual." The Court rejected EEOC guidelines which precluded consideration of remedial measures in determining disability status. The Court criticized the EEOC Guidelines because of their focus on the nature of the impairment, rather than upon the effect of the impairment on the life of the individual. The Court opined that this

> would, in many cases, force [courts] to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. . . . Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.

Sutton, 527 U.S. at 483-84

In *Murphy*, 527 U.S. at 523, the Court construed 29 C.F.R. § 1630.2(j)(3)(i) as requiring that an ADA plaintiff show that he or she cannot perform a class of jobs. The Court held that the category of jobs requiring a commercial drivers license (CDL) did not constitute a "class of jobs" and, therefore, the plaintiff, who could not obtain a CDL, had not adduced sufficient evidence. It is noteworthy that the CDL requirement, by virtue of its application to all trucks weighing over 10,000 pounds, applies to virtually all long distance trucking in the United States. Likewise, in the case at bar, plaintiff has only shown that he cannot perform unskilled work involving heavy or extremely heavy lifting. Heavy lifting may be a requirement for some jobs, as having a CDL may be for others. Neither requirement describes a class of jobs. Like *Murphy*, Duncan utterly failed to prove that he could not perform a class of jobs.

Both *Sutton* and *Murphy* endorsed the requirement to which petitioner objects, that an employee claiming a substantial limitation in the major life activity of working must present evidence regarding the availability of jobs in the applicable labor market. In *Sutton*, in considering the meaning of a substantial limitation, this Court opined that it

> requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. . . . If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton, 527 U.S. at 491-92. This Court cautioned that a restriction adopted by a single employer could not be imputed to the industry generally. *Id.* at 493-94. In *Murphy*, which affirmed the grant of summary judgment for failure to prove a substantial limitation on working, the Court specifically

stated that, "in light of petitioner's skills and *the array of jobs available to petitioner* utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs." *Murphy*, 527 U.S. at 525 (emphasis added). In *Murphy* and *Sutton*, this Court thus recognized that the prevalence of jobs in the labor market should be considered when determining whether the individual is substantially limited in the major life activity of working. *See Murphy*, 527 U.S. at 524 and *Sutton*, 527 U.S. at 492. Petitioner's attack on the decision below for imposing a requirement that plaintiff present evidence on the jobs available to him (Pet. at 13, 26) is simply inconsistent with *Sutton* and *Murphy*.

In the wake of *Sutton*, in ruling on a motion for judgment, a court should consider the degree to which the plaintiff has satisfied the quantitative requirement of 29 C.F.R. § 1630.2(j)(3)(ii) (the regulation specified in *Sutton* and *Murphy*). The following review of cases indicates intra-circuit differences, depending upon whether this regulation was addressed. For example, in the Ninth Circuit, defendants prevailed in *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997), and *Broussard*, 192 F.3d at 1259, where the court discussed the absence of labor market evidence as required under § 1630.2(j)(3)(ii). Yet, in *Wellington v. Lyon School Dist.*, 187 F.3d 1150, 1156 (9th Cir. 1999), where the employee prevailed, the Ninth Circuit completely ignored § 1630.2(j)(3)(ii), and found that plaintiff had satisfied his evidentiary burden. Similarly, when the Eighth Circuit applied § 1630.2(j)(3)(ii) in *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996), it affirmed the grant of summary judgment, finding no disability within the meaning of the ADA, where the plaintiff was limited by a 25 lb. lifting restriction. By contrast, in *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996), the same court ignored § 1630.2(j)(3)(ii) and reversed summary judgment. In *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), which applied these factors, a jury verdict

for plaintiff was reversed, whereas *Heyman v. Queens Village Committee for Mental Health*, 198 F.3d 68 (2d Cir. 1999), cited by petitioner, failed entirely to address the specific requirements of the major life activity of working contained in § 1630.2(j)(3)(ii). *Compare Rockwell*, 243 F.3d 1012, 1017-18 (7th Cir. 2001) (EEOC must provide evidence of the number and types of other jobs in Southern Illinois from which the applicants would be excluded) *with Best v. Shell Oil Co.*, 107 F.3d 544, 548-9 (7th Cir. 1997)[4] *and Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996) (neither pre-*Sutton* opinion mentioned § 1630.2(j)(3)(ii)).

Petitioner simply objects to the standard adopted in *Sutton* and *Murphy*. The logic of *Sutton* is that proof regarding the number of jobs available and proof regarding the number of jobs from which one is precluded are related concepts. If the number of jobs from which one is precluded, compared to the total number of jobs which would have been available but for the impairment (i.e., jobs precluded plus jobs available), is a small percentage, one is not significantly impaired in working. If the number of jobs from which one is precluded, compared to the total number of jobs which would have been available is a large percentage, one is significantly impaired in working.

II. THERE IS NO SPLIT IN THE CIRCUITS

The en banc decision in *Duncan* is consistent with the reasoning and holdings of at least seven appellate courts. *See Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 647 (2d. Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999)

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4. *Best*, 107 F.3d at 548, is completely inconsistent with *Murphy* since *Best* impliedly held that an inability to drive trucks with a clutch constituted a class of jobs, while *Murphy* held that an inability to drive trucks requiring a commercial drivers license did not constitute an inability to perform a class of jobs.

(reversing jury verdict in favor of three police officers in an ADA case for want of evidence); *Mondzelewski v. Pathmark Stores*, 162 F.3d 778, 785 (3d Cir. 1998) (illustrating plaintiff's reliance on expert testimony from vocational rehabilitation specialist); *Dupre v. Charter Behavioral Health Systems*, 242 F.3d 610, 614 (5th Cir. 2001) (faulting plaintiff because she "presented no evidence that she would be disqualified from all jobs requiring manual labor"); *Sherrod v. American Airlines, Inc.*, 132 F.3d at 1112, 1120 (5th Cir. 1998) (noting plaintiff's inability to present evidence of the number and types of jobs from which she is disqualified or evidence that her training and skills limit her to jobs requiring heavy lifting); *Rockwell Int'l. Corp.*, 243 F.3d at 1017-18 (7th Cir. 2001) (faulting the EEOC for providing no evidence of whether plaintiff was foreclosed from employment in Southern Illinois, other than the four Rockwell jobs); *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998) (faulting employee for providing "no evidence of the number of jobs from which she is precluded because of this impairment"); *Aucutt*, 85 F.3d at 1319 (8th Cir. 1996) (affirming summary judgment for employer, where employee had angina and coronary artery disease in addition to having a 25 lb. lifting restricting); *Thompson*, 121 F.3d at 540 (9th Cir. 1997) (faulting employee for failing to show that she was disqualified from an entire class of jobs); *Broussard*, 192 F.3d at 1257-58 (9th Cir. 1999) (affirming summary judgment for employer where the rehabilitation counselor based his conclusions on categories of jobs, i.e., 'sedentary' and 'light manual"); and *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (involving an order selector, whose work was comparable to Mr. Duncan's). In *Duncan*, Chief Judge Edwards, dissenting, correctly stated "there is no magical legal standard for measuring substantial limitation." Pet. 50a. The case by case nature of the disability determination makes it difficult to establish a conflict among

the circuits and militates against granting the instant petition. The variation in outcomes is most often attributable to differences in fact patterns.

No court has held that there is a per se rule that expert evidence is required. *Duncan*, Pet. 35a; *Mullins v. Crowell*, 228 F.3d 1305, 1327 n.18 (11th Cir. 2000); and *Rockwell*, 243 F.3d at 1017. Although the D.C. Circuit requires quantitative information, it does not require "statistical information." It found that although expert vocational testimony is very persuasive, it is not required. Pet. 35a.

Petitioner erroneously contends that the en banc court "candidly recognized that its decision was directly contrary to decisions of the Sixth, Ninth and Eleventh Circuits." Pet. at 10. The en banc court did recognize that its decision was contrary to *Wellington*[5], introducing its treatment of that case with the signal "but see." The next two decisions cited by the D.C. Circuit, *Burns v. Coca-Cola Enter., Inc.*, 222 F.3d 247 (6th Cir. 2000) and *Mullins*, were introduced with the signal, "cf," indicating support for the main proposition espoused by the D.C. Circuit, not contradiction. This is hardly surprising, since in *Burns*, the Sixth Circuit went to great lengths to explain that the district court had made the requisite individualized showing, finding the employee disabled "because his back injury precluded him from performing at least 50% of the jobs that he was qualified to perform given his educational background and experience." *Burns*, 222 F.3d

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5. In her original panel decision, Judge Henderson disparaged *Wellington* because, although it was decided after *Sutton*, it did not address *Sutton*. A later decision of the Ninth Circuit, *Broussard*, 192 F.3d at 1257-58, did address *Sutton* and considered the sufficiency of the evidence, based upon the declaration of a vocational rehabilitation specialist regarding the percentage of jobs from which plaintiff was barred in the relevant geographic area. Pet. at 7a n.3.

at 253.[6] In *Mullins*, the court noted that the plaintiff could satisfy his evidentiary burden without expert evidence by testifying about his own extensive job search. 228 F.3d at 1315 n.18. Thus, there is no conflict among the circuits with respect to the issue petitioner seeks to present.

Several of the cases cited by petitioner do not support his contention that there is a split among the circuits. For example, petitioner identifies *Bartlett v. NY State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000) as being in conflict with the decision in *Duncan*. *Bartlett* specifically held that the court's role is to compare the jobs utilizing an employee's training, knowledge, skills or abilities with the jobs from which the employee is excluded, and to determine whether the employee thereby faces "a significant restriction with respect to" the jobs available. 226 F.3d at 83. In reversing and remanding to the district court, the Second Circuit held that the plaintiff must prove that it is "the impairment and not some other factor or factors, that causes the substantial limitation." 226 F.3d at 84-85.

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6. Contrary to petitioners' description, the decision was not based "solely upon Burns' limited educational background and work experience along with his physician's testimony." Pet. 18. The trial court relied upon the affidavit of a vocational consultant, who supplied expert testimony regarding the effect of the impairment on the plaintiff's employment prospects. *Burns v. Coca Cola*, No. 3:97-cv-746 (E.D.Tenn. Aug. 26, 1998). Such testimony, which has made the difference for many plaintiffs, is lacking here. *See Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 785 (3d Cir. 1998) and *Fjellestad v. Pizza Hut*, 188 F.3d 944, 948-49 (8th Cir. 1999). In *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 12 (1st Cir. 1999), the court found there was evidence that in Maine, where Quint lived, physically demanding jobs are a mainstay, finding that a medical doctor had qualified at the trial to render an expert opinion regarding the prevalence of physical labor jobs in Maine and found that this evidence was sufficient to present a triable issue of fact.

Mondzelewski, 162 F.3d at 785, also cited in support of the notion of a split among the circuits, adopts the requirement that to establish a significant impairment in the major life activity of working "require[s] evidence of the approximate number of jobs from which the individual is precluded from working." In *Mondzelewski*, plaintiff surmounted this evidentiary hurdle by presenting the report of a vocational rehabilitation expert which showed that there were an extremely small number of jobs listed in DOL's *Dictionary of Occupational Titles* for which he was qualified and that there were few employment prospects in Mondzelewski's geographical area. This is precisely the kind of evidence missing from the instant case. Duncan's vague testimony regarding the jobs he sought does not satisfy this evidentiary standard.

III. THE WATERED DOWN STANDARD URGED BY PETITIONER IS INCONSISTENT WITH *ALBERTSON'S.*

In *Albertson's*, 527 U.S. at 564-65, this Court criticized the Ninth Circuit for being "too quick to find a disability," finding that the appellate court had watered down the statutory requirement of a "significant restriction" in an individual's ability to perform a major life activity to a showing of a "mere difference," without regard to the effect of the impairment on his ability to work. Duncan argues that "injured people who have a reduction in the available job pool and are precluded from a class of jobs or significantly restricted from a broad range of jobs should be protected by the statute." Pet. at 26. The fatal flaw in this argument is that it denies the need for a showing of relative magnitude. One has not suffered a significant impairment in working if the diminution in employment prospects is small. Even if heavy lifting constituted a "class of jobs," disability status would depend on whether there is a relatively large or small

number of jobs available in the applicable job market for which an employee is still qualified notwithstanding his impairment.

Petitioner's proposed lesser standard of proof, to be satisfied by testimony as to his back problem, his limited education and lack of transferable skills (Pet. 13, 28), would dilute the requirement of a significant restriction, transforming it into a showing of a mere effect. If petitioner's argument were accepted, then the population of persons who could claim protection under the ADA would swell enormously. This is clearly inconsistent with *Sutton*, which expressly determined that the potential population of persons with disabilities was in the 43 million range, not in the 160 million range. *Sutton*, 527 U.S. at 463-64.

Petitioner contends that no quantitative information is required to establish a substantial impairment in working, as all that is required is a showing of preclusion from a class of jobs. Pet. 25, 26, 28. This is a concept derived from an example in the EEOC's Guidelines, which was rejected by the Panel, although not discussed by the en banc court in *Duncan*. Pet. 3-4, 17 n.5, and Pet. 7a and 10a. The Guidelines state that disqualification from performing heavy labor jobs because of a back condition satisfies the requirement of showing a substantial limitation, even if the individual were able to perform work in another class of jobs. 29 C.F.R. § 1630.2(j), app. This guideline and the assumption it embodies are contrary to *Sutton* and its progeny. The en banc court characterized *Sutton* as making clear that "whether an impairment substantially limits the major life activity of working depends primarily on the availability of jobs for which the impaired person qualifies," which is an individualized inquiry. Pet. 32a-33a. *See Rockwell*, 243 F.3d at 1017 (". . . according to the Commission's own regulations, its case must include some proof of the 'number and types of jobs' within the 'geographical area to which the

claimant has reasonable access.' "); *Dupre*, 242 F.3d at 614 ("There exist, however, many jobs involving only light labor that Dupre seemed perfectly capable of performing."); and *Broussard*, 192 F.3d at 1258-59 ("it does require . . . evidence from which one might infer that plaintiff faced significant restrictions in her ability to meet the requirements of other jobs.") These decisions of the Fifth, Seventh, and Ninth Circuits, all of which properly applied *Sutton*, are consistent with the decision of the D.C. Circuit below in holding that labor market information is required to permit a trier of fact to assess the actual impact of the impairment. Petitioner's argument, that such information is in his case superfluous, is at odds with *Sutton*.

The "class of jobs" concept urged by petitioner is so open-ended as to be meaningless. Duncan defines the class of jobs as heavy lifting jobs. A second litigant might define a class of jobs as those requiring concentration. A third might define a class of jobs as those requiring one to stand all day long. The common analytical problem is that they posit a class of jobs in terms of functional limitations rather than in the context of the labor market's notion of related occupations and professions. A benchmark for identifying what jobs might constitute a class is contained in the Dictionary of Occupational Titles, published by the Department of Labor. *See* DOL, *Dictionary of Occupational Titles* (4th Ed. 1991), *at http://www.oalj.dol.gov/libdot.htm.* It does not identify heavy lifting as a job title. The Dictionary of Occupational Titles analyzes thousands of jobs within discrete groups of job families. These job families would more naturally be characterized as "classes of jobs" as intended by *Sutton*. Each job within a job family is analyzed in terms of its strength requirements as well as multiple other requirements.

Within the job family of "Occupations in Moving and Storing Materials" identified in the Dictionary, the strength

requirements for individual jobs range from light to medium to heavy. DOL, *Dictionary of Occupational Titles* § 922 (4th ed. 1991). Laborer, Stores (Job No. 922.687-058) is the job within this family most akin to Duncan's job and it requires medium lifting. "Laborer, Stores" is described as order picker, parts picker, stock selector and warehouse worker, whose incumbents "convey materials or items from receiving or production areas to storage or other designated areas by hand, handtruck or electric handtruck." Petitioner conceded that despite his impairment, he remained qualified for the AFC parts runner job, which entails lifting parts weighing as much as 30 pounds.

Petitioner suggests that this Court adopt one evidentiary rule for skilled personnel and another for unskilled personnel because, in the case of unskilled personnel, requiring quantitative evidence "is superfluous." Pet. 22-23. Petitioner suggests that there are circumstances where the employee would "obviously" be precluded from a class of jobs, as is the case with him. Pet. 22 n.8. Petitioner offers no means to distinguish between these two groups.[7] It was not obvious to nine judges of the D.C. Circuit that he was precluded from a class of jobs. Plaintiff asks, why he should have to provide the number and types of "unskilled manual jobs that were unavailable in this area if one's impairment precluded one from doing all such work?" Pet. at 23. The answer is that it matters a great deal whether the number of unskilled manual jobs in the region is 100 or 10,000, and whether most of those jobs involve heavy, medium or light lifting, since at trial Mr. Duncan did not claim that he could not perform all manual jobs, only those requiring heavy lifting. It matters a

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7. Likewise, he contends that the class of jobs requiring heavy lifting is much broader than the airline pilots class of job. Pet. 25. This is not empirically self evident, at least in the Washington metropolitan area and evidence would be required to establish that element of his burden of proof.

great deal whether his inability to find work is because his job hunt was half-hearted and inadequate or whether he was disadvantaged by his impairment.

Mr. Duncan suggests that his lack of education and lack of experience in jobs that did not require heavy lifting supports an inference that his impairment created a significant barrier to employment. Pet. 23. This is farfetched because Mr. Duncan sought unskilled laborer's work, for which advanced education and prior experience in particular tasks is by definition not required. To obtain unskilled work, a person must show that he or she has the basic traits to hold down a job, such as the ability to reliably and punctually report to work. Under *Sutton*, a finding that a disability presents a barrier to employment must be based upon quantitative evidence derived from the relevant geographical market

IV. WORKING IS *NOT* A MAJOR LIFE ACTIVITY

This Court should also decline to grant certiorari because it is likely that in a future case, this Court will reject the concept of working as a major life activity, and therefore the evidentiary standards at issue here will become moot. In *Sutton*, the Court indicated that it has grave reservations about the propriety of classifying "working" as a "major life activity." Declining to resolve the issue, it noted:

> there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."

Sutton, 527 U.S. at 492.

The EEOC, rather than Congress, has defined "working" as a major life activity. The ADA defines the word disability in terms of its substantial limitation on major life activities without defining the phrase "major life activities." 42 U.S.C. § 12102(2) (1995). In *Sutton*, this Court specifically found that "no agency has been delegated authority to interpret the term 'disability.' " *Sutton*, 527 U.S. at 479. The Court declined to decide what level of deference should be afforded to the EEOC's ADA regulations. *Murphy*, 527 U.S. at 523, and *Albertsons*, 527 U.S. at 563 n.10.

Working is not a major life activity because it is not an aspect of basic human physical or mental functioning. When an individual cannot perform a broad category of jobs, it is because an impairment has a substantial effect on his mental or physical functioning, *which in turn* makes it difficult or impossible to work. The employee should be able to show that there is a causal relationship between the impairment and the reduced prospects for employment: i.e., the impairment's physical or mental consequences in terms of the gross inability to perform some basic aspect of human life functions. If the employee can make this showing of gross impairment of functioning, there is no need to address the curtailment of employment.

The three judges who concurred in *Duncan* pointed out several conceptual problems involved with treating work as a major life activity. Pet. 37a-39a. They observed that the existence of a disability will turn on factors more economic than physical or medical. For example, in a period of high unemployment, more people would be found disabled, because the more difficult it is to find employment, the more likely that an employee can establish a substantial limitation in working. These judges noted that this is inconsistent with Congress' stated purpose that the ADA supply "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b).

Even the EEOC recognizes that "working" is different from other major life activities, because there are additional criteria which must be met. 29 C.F.R. § 1630.2(j)(3) (1999). The Interpretative Guidelines provide that if an employee is substantially limited in some other major life activity, no determination should be made with regard to working. § 1630.2(i). The use of working as a major life activity poses substantial problems when an employee requests that his employer provide reasonable accommodation, such as a job modification, on the basis of his inability to perform his present job. At the time the request is made, neither employee nor employer has information about the employee's prospects for other employment. Yet, the law is clear that the inability to perform one's existing job cannot constitute the basis for a finding of substantial impairment of the major life activity of working. Conceptually, working cannot be the major life activity used to establish one's disabled status.

CONCLUSION

This case does not satisfy the requirements for granting certiorari because the decision of the en banc court in *Duncan* is consistent with applicable precedent of this Court and of circuit courts interpreting the *Sutton* trilogy. Thus, the Petition for a Writ of Certiorari should be denied. The decision in *Williams* will not address the primary issue on which WMATA was granted judgment as a matter of law, the quantum of proof necessary to take a case to a jury, and thus this case should not be stayed pending its resolution.

Respectfully submitted,

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SEP 2 2001

No. 00-1776

In The

Supreme Court of the United States

JIMMY L. DUNCAN,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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This Petition presents two major and interrelated questions regarding the Americans With Disabilities Act: (1) What constitutes a substantial limitation in the major life activity of working?; (2) What type of evidence must be adduced to support such a claim? As will be explained below, this Court granted certiorari in a case presenting similar issues, Toyota Mfg., Ky., Inc. v. Williams, Petn. No. 00-1089 (cert. granted, April 16, 2001). Since the decision in Williams may well decide the outcome of this case, this court should at a minimum hold the Petition for Certiorari in this case pending the decision in Williams. Nonetheless, there is a substantial split in the circuits which warrants granting of this petition. The decision below conflicts with at least six federal circuit courts of appeal. Respondent either failed to address or downplayed without actually distinguishing the six circuit court decisions that conflict with the decision below.

I. WILLIAMS MAY WELL DECIDE THE OUTCOME OF THIS CASE

Respondent asserts that the outcome in Toyota Motor Mfg., Ky., Inc. v. Williams, No. 00-1089, cert. granted, (April 16, 2001) "is immaterial to further disposition of this case." Brief in Opposition ("Opp.") 2. Said assertion is wrong.

The Petitioner in Williams (hereinafter "Toyota") principally argues that the Sixth Circuit erred by finding a disability solely based upon Williams' "inability to 'perform the manual tasks that are job related" because "the court below circumvented the established rule that a disability must amount to more than an inability to do a specific job." In so holding, Toyota further argues that the Sixth Circuit "circumvented" or "conflated" the standard expressed by the EEOC and in all case law that "the inability to perform one

job is not sufficient to prove one is substantially limited in the major life activity of working. (Williams, Pet. Brief at 10, 19 other citations omitted) Toyota argues that the Sixth Circuit "made an end run" and "collapses the distinction" between proving one is substantially limited in the major life activity of manual tasks versus working. Id.

Further, several amici have addressed the issue of what standard of proof is required to show a substantial limitation in the major life activity of working. One amicus contends that the ADA protects only those who "without statutory protection, might be largely if not entirely foreclosed from the job market." (Brief of Amicus Curiae, the American Trucking Associations, Inc., et. al., p.15). Another suggests that a plaintiff such as Williams must show that her impairment "all but precluded the employee from using the employee's hands and the employee... was unable to find work in a field for which the employee had necessary training or skills."(Brief of Amicus Curiae Levi Strauss & Co., pp.27-28)

The Plaintiff, Williams, on the other hand, argues strongly that the term "disability" cannot be interpreted in such a severe manner because it would only allow those whose restrictions are so severe as to prevent them from working entirely to be considered "disabled." This would thwart the operative provision of the ADA. Williams, Respondent Brief at 29,31.

Williams also argues, as we do, that the operative test for courts to find a substantial limitation in working is "whether the particular impairment constitutes for the particular person a significant barrier to employment." Williams Respondent Brief at 38-39, 43 citing Forrisi v. Bower, 794 F.2d 931 (4th Cir. 1986). Williams urges this

Court to examine Williams' limited educational background and work experience when making the determination of whether Williams is substantially limited in working under this test. Petitioner herein has argued that his evidence was sufficient under such a test and that this test should be followed. Pet. 21.

Finally Williams argues she was precluded from a class of jobs since she was precluded from all jobs requiring repetitive manual activity and jobs requiring frequent lifting more than 10 pounds. Thus she argues she was substantially limited in the major life activity of working. Williams Respondent Brief at 43. The facts presented by Petitioner herein are extremely similar – that he was precluded from all jobs requiring frequent lifting over 20 pounds, which was the only type of job he had performed his entire life, for the most part. If this Court finds there were disputed facts as to whether Williams was substantially limited in the major life activity of working, then the jury verdict must be reinstated in the present case because of the similarity of facts.

Accordingly, it is clear that this Court in Williams may well decide the interrelationship between being substantially limited in the major life activity of manual tasks and being substantially limited in the major life activity of working. Therefore, this Court in Williams may well have to decide if there are different standards and proof requirements to prove one is disabled by showing a substantial limitation in the major life activity of manual tasks versus working. Further, this Court may well decide in Williams if one can prove substantial limitation in working by proving one's impairment creates a "significant barrier to employment" by examining individualized characteristics such as limited education and vocational background. If this Court has to clearly enunciate the proof requirements to

show a substantial limitation in working under the ADA, Williams will likely decide the outcome of the instant case. Therefore, at a minimum, this petition should be held pending the outcome in Williams.

II. THE DECISION BELOW CONFLICTS WITH SIX OTHER CIRCUITS

Respondent is wrong to suggest that the sharp conflict between the decision below and those of other circuits is not a "true conflict" and that "there is no split in the Circuits." See Opp. 1, 12-16. As noted in the Petition, each and every one of the six Circuit decisions cited by Petitioner focuses on whether one's physical impairment precludes one from a class of jobs or broad range of jobs, not on the numbers and types of jobs "available" to the Plaintiff, the standard set by the D.C. Circuit. See Pet. 13-23. Respondent ignores this important split between the six Circuit decisions and the decision below. Respondent either admitted that a decision conflicted, failed to address at all or downplayed without distinguishing the six circuit decisions that are in conflict with the decision below.

First, Respondent has admitted that the en banc D.C. Circuit "did recognize that it's decision was contrary" to the Ninth Circuit in Wellington v. Lyon County School Dist., 187 F.3d 1150 (9th Cir. 1999), Opp. 14. Respondent attempts to downplay this conflict by contending that Wellington "did not address Sutton," whereas another Ninth Circuit decision, Broussard v. Univ. of California, 192 F.3d 1252 (9th Cir. 1999) did address Sutton. Id. The fact that Wellington did not mention Sutton and Broussard did mention Sutton is irrelevant because Sutton does not address the questions presented in this case. Further, the decision below is inconsistent with and misinterprets Sutton. (Petn. at 24-29).

Most importantly, the Ninth Circuit did not state Broussard overruled Wellington. Finally, Broussard is factually distinguishable and inapplicable. Broussard failed to present any medical evidence that she was precluded from a class of jobs or had any specific lifting restrictions, contrary to Duncan's evidence herein. Therefore, the court examined her vocational evidence and found it deficient.[1]

Respondent also downplays the great conflict between the decision below and Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999). Respondent suggests that the evidence in Quint from a medical doctor that Quint was "precluded from a lot of jobs" that existed in her state because she was precluded from all physical labor jobs was somehow different than that presented herein and would have met the D.C. Circuit standard. This is not true at all. The D.C. Circuit standard required a showing of the number of jobs that were available to Petitioner with his impairment. No such showing was made by Quint as to either the jobs available to her based upon her impairment or the number and types of jobs she was precluded from because of her impairment. The medical doctor's very non-specific testimony is an obvious fact that exists in any major

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[1] Respondent's reliance on another Ninth Circuit opinion, Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997) (per curiam) is entirely suspect as this case is readily distinguishable. The Thompson court only discussed the plaintiff's failure to submit statistical evidence of the number and types of jobs she was precluded from because the defense had proffered an affidavit from a vocational counselor that the plaintiff, a nurse, was still qualified for a number of registered nurse positions. Id. at 540. No such evidence was submitted by WMATA at trial in the instant case.

metropolitan area or any state in the union; a jury does not need to be told it. Said evidence in Quint added nothing to the quantum of evidence in front of the jury and does not make this case any different than Quint. Quint is in direct conflict with the decision below as it is almost factually identical but reached an entirely different result.

Respondent admits that no courts, including the Eleventh Circuit in Mullins v. Crowell, 228 F.2d 1305, 1327, n. 18 (11th Cir. 2000) have held that expert vocational statistical evidence is a "per se" requirement to show a substantial limitation in working. Opp. 14. Again, Respondent attempts to downplay the split between Mullins and the instant case by arguing that the Court in Mullins noted the Plaintiff could satisfy his evidentiary burden without expert testimony "by testifying about his own extensive job search." Id. However, Petitioner did testify about his extensive job search because he testified he was on unemployment for nine months before settling for a minimum wage part-time job earning one third of his pre-termination salary. Clearly, the jury could infer Petitioner applied for countless jobs to be eligible for unemployment benefits as this is a mandatory requirement within the common knowledge of the jury. Thus Petitioner's evidence was not materially different from Mullins.

In addition to downplaying the conflict between the decision below and the First, Ninth and Eleventh Circuits, Respondent did not even mention the Fourth Circuit decision of Cline v. Wal-Mart Stores, Inc., 144 F.3d 294,303 (4th Cir. 1998) which is in direct conflict with the decision below. See Pet. 17-18. Also Respondent barely mentions the Second Circuit opinion in Bartlett v. NY State Board of Law

Examiners, 226 F.3d 69 (2d Cir. 2000).[2] Bartlett again is in direct conflict with the decision below because no evidence was presented as to what jobs were either "available" to Bartlett with her impairment or to what jobs she was "precluded" from because of her impairment. Pet. 17. The Second Circuit held she was precluded from "countless jobs" practicing law because of her impairment as a result of "common knowledge" and found this to be enough evidence to create a fact question on the issue of disability

Next Respondent asserts that Burns v. Coca-Cola Enter., Inc., 222 F.3d 247 (6th Cir. 2000) is not in conflict with the court below because of the fact that the District

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[2] Respondent's citation of another Second Circuit decision, Colwell v. Suffolk County Policy Dept., 158 F.3d 635 (2d Cir. 1998), cert denied, 119 S.Ct. 1253 (1999), is of no moment because the facts have no applicability to the present case. Colwell involved several police officers who claimed that they were "disabled" under the ADA because they had back or neck impairments that substantially limited them in the major life activity of working The Second Circuit found that these officers were still working in light duty jobs in the police department and presented no evidence at all they were precluded from any particular class of jobs. Id at 645. Since the officers had done light duty work in the law enforcement area, their ability to work was not substantially limited in the field they were in. Id. This is directly opposite from Petitioner whose impairment precluded him from heavy labor jobs, a class of jobs, in which he had almost exclusively worked before and he was unable to work in any longer.

Court relied upon an uncited [3] affidavit from a vocational expert that Burns was precluded from at least 50% of the jobs he was qualified from. First, Respondent misses the point entirely because again the Sixth Circuit examined whether the Plaintiff's impairment precluded him from a significant percentage of jobs in the class for which he was qualified (i.e. heavy labor jobs), not what jobs were available to him as a result of the impairment. Accordingly, Burns is in direct conflict with the decision below. Further, Burns is in conflict with the decision below as to the quantum of proof necessary to survive a summary judgment motion. This is so because Petitioner argued, based upon his prior work experience (i.e. almost exclusively limited to jobs requiring heavy lifting), his medical impairment and limited educational background, that he was disqualified from 100% of the jobs that he had transferable skills to perform Duncan's evidence is no different than Burns' evidence.

Finally, Respondent asserts that the Third, Fifth, and Tenth Circuits support the lower court decision. Opp.12-13. We believe Respondent has totally misread these cases as they are all factually distinguishable. Nonetheless even if these cases are consistent with the holding of the D.C.

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[3] This affidavit was not referenced at all in the Circuit Court opinion nor was it referenced by the D.C. Circuit which stated that the District Court's finding in Burns "was apparently based solely on a 23-pound lifting limit and limited education and work experience." (emphasis added) App.35a. Accordingly, the D.C. Circuit believed that Burns was in conflict with Duncan's evidence herein because Duncan presented almost identical medical evidence as to his lifting restriction and his limited educational background and work experience.

Circuit as Respondent asserts, Respondent's citation of these cases show how widespread a conflict there is among the circuits with six circuits in conflict with the decision below, three circuits allegedly consistent with the decision below and the Seventh Circuit having conflicting decisions. Pet.19-21.

Accordingly, because of the split between and among the Circuits, Petitioner requests that the Petition be granted to settle the questions of law presented herein.

III. RESPONDENT HAS WAIVED ITS RIGHT TO CONTEST THE JURISDICTION OF THIS COURT

Respondent asserts for the first time in this litigation after more than six years, that federal courts lack jurisdiction over claims against WMATA brought under the ADA. Petitioner will not discuss the merits of the Respondent's position because the Respondent has clearly waived the right to argue this position. It has failed to raise said issue for six years and it submitted to the jurisdiction of the Federal Courts through a trial and lengthy appellate process. Numerous Federal Circuit Courts of Appeal have held that such a failure to raise the Eleventh Amendment as a defense constitutes a waiver of said right when raised at a late date. Hill v. Blind Industries and Services of Maryland, 179 F.3d 754,758 (9th Cir. 1999) (other citations omitted)

This issue on the merits has never been briefed and this Court should not deny a Petition for A Writ of Certiorari when such an issue clearly has been waived and never addressed by the lower courts. At a minimum, this is an issue for remand once the other issues in this case are decided by the Supreme Court.

IV. RESPONDENT FAILED TO PROPERLY RAISE THE ISSUE OF WHETHER WORKING IS A MAJOR LIFE ACTIVITY

Finally, Respondent argues that this Court should deny certiorari because "working is not a major life activity." Opp. 20-22. This issue has also been raised by an amicus brief in Williams (Brief of Amicus Curiae, the American Trucking Associations, Inc., et. al. p. 15). However, this issue was never properly raised as it was first raised by Respondent in a Supplemental Brief in the en banc proceedings below. Such an argument was never raised in the District Court or in all briefs in the initial stages of the appeal. In fact, Judge Henderson in the initial panel decision of the court below noted:

> The parties to this appeal agree that Duncan's degenerative disc disease was a physical impairment and that 'working is the activity involved and that it is a major life activity under the ADA.' See, e.g., Brief of Appellant at 16, Brief of Appellee at 15-19). App 5a. (Emphasis added)

The Court below did not decide this issue but only commented on the issue in a concurring opinion. Thus it is improper to raise such an issue when it was never decided or properly raised below. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); Accord, Swanks v. WMATA, 179 F.3d 929,936 citing Chedick v. Nash, 151 F.3d 1077, 1084 (D.C. Cir. 1998)

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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